Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN CHRISTO JR., JOHN CHRISTO III, JAMES PHILLIP CHRISTO, and IRENE LAURETTE CHRISTO,

Petitioners,

v.

KENNETH EARL PADGETT,

Respondent.

Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR *WRIT* OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Eleventh Circuit decide an important federal question in a way that conflicts with relevant decisions of this Court by permitting the district court to address the merits of the Petitioners' state law claims, which were removed from state court to federal court by the Respondent, before the district court had satisfied itself of its jurisdiction over the subject matter?

2. Did the Eleventh Circuit decide an important federal question in a way that conflicts with relevant decisions of this Court by permitting the district court to dismiss the Petitioners' state law action, in which a jury trial was required under the Seventh Amendment, on the basis of facts found by the district court after a one-day evidentiary hearing?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case. None of the parties has a parent company or nonwholly owned subsidiary.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, filed on August 25, 2000, is reported at *Christo v. Padgett*, 223 F.3d 1324 (11th Cir. 2000), and is set forth in the Appendix at A-1.

The district court's unreported order in Case No. 5:98-cv-38/Bankruptcy Case No. 94-02031 finding that there was no enforceable agreement between the Defendant-Respondent and any of the Petitioners-Plaintiffs and referring to the bankruptcy court the Respondent's motion to approve a settlement of the Petitioners' claims entered into with the bankruptcy trustee for one of the Petitioners was filed on July 14, 1998, and is set forth in the Appendix at A-33.

The district court's unreported order in Case No. 5:97-cv-320 denying the Petitioners' motion to remand and granting the Respondent's motion to dismiss was filed on October 1, 1998, and is set forth in the Appendix at A-39.

The bankruptcy court's unreported report and recommendation of approval of the settlement agreement in Case No. 5:98-cv-38/Bankruptcy Case No. 94-02031 was filed on October 7, 1998, and is set forth in the Appendix at A-58.

The district court's unreported order in Case No. 5:98-cv-38/Bankruptcy Case No. 94-02031 adopting the bankruptcy court's report and recommendation of approval of the settlement agreement was filed on October 22, 1998, and is set forth in the Appendix at A-68.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was filed on August 25, 2000. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 38(a) provides:

> RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. P. 56(c) provides:

MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 81(c) provides:

REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing

of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

Fed. R. Bankr. P. 9015(a) provides:

APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b)

F.R.Civ.P. shall be filed in accordance with Rule 5005.

28 U.S.C. § 1334 provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely

adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

STATEMENT OF THE CASE

Statement Of The Facts

Prior to the summer of 1993, all of the outstanding stock of Bay Bank & Trust Company ("Bay Bank"), a Florida financial institution, was owned by Florida Bay Banks, Inc. ("FBB"), a one-bank holding company. The majority of FBB's common stock was owned by the J.C.J. Irrevocable Trust Agreement (the "J.C.J. Trust") and the Bay Bank and

Trust Company Employee Stock Ownership Plan (the "ESOP"). The J.C.J. Trust was established by Petitioner John Christo Jr. ("Christo") in 1980 for the benefit of his three children, Petitioners John Christo III, James Phillip Christo, and Irene Laurette Christo. John Christo III was the Trustee of both the J.C.J. Trust and the ESOP. All three Christo children owned additional shares of the common and preferred stock of FBB individually and through their participation in the ESOP. Christo individually owned approximately 97% of the preferred stock of FBB.

FBB defaulted on a $4.5 million loan from SouthTrust Bank of Alabama, N.A. ("SouthTrust"), secured by all of FBB's stock in Bay Bank. Litigation between the Christos and SouthTrust led to a settlement agreement providing for a court-ordered sale of the Bay Bank stock, which was scheduled to take place on September 30, 1993. The impending auction imperiled the Christos' ongoing negotiations with Union Planters Corporation ("Union Planters"), a bank holding company, for a stock purchase of Bay Bank because Union Planters could not complete its due diligence prior to the date of the auction.

Realizing that the proposed sale to Union Planters would not be consummated in time to avoid the forced sale by SouthTrust, Christo contacted Respondent Kenneth Earl Padgett ("Padgett"), his friend and sometime business associate of more than 70 years, and requested Padgett to bid on the stock of Bay Bank on behalf of the Christos. Christo also contacted another potential bidder, Rick Jenson, in New Orleans, who agreed to bid on the stock if Padgett was not

available. Christo chartered a plane to fly to Birmingham to meet Mr. Jenson in the event that Padgett was unable to bid on the Christos' behalf. When Mr. Jenson flew to Birmingham on the day of the sale, Christo informed him that he and Padgett had entered into an oral agreement (the "Agreement") whereby Padgett would act as the Christos' agent in bidding on the stock of Bay Bank at the SouthTrust foreclosure sale.

According to the Agreement, which Padgett denies ever existed, Padgett agreed to bid on behalf of the Christos or their assigns, and understood that Christo represented his children as well. In the event that Padgett was the successful bidder, the Christos would provide a cashier's check in the amount of $250,000 as a bid deposit. Padgett would then assign his rights to the Christos' designee, which, at the time, it was contemplated would be Union Planters.

In this manner, the Christos would be able to maximize the value of the bank by continuing with the sale to Union Planters, which had discussed a figure of $13,750,000 with Christo with respect to its proposed purchase of the bank. In addition, from Padgett's standpoint, by facilitating the sale to Union Planters, Padgett would be able to avoid potential liability on his personal guaranty of a $450,000 loan by Bay Bank to Christo.

Padgett, on behalf of the Christo Group, was the successful bidder in the amount of $8,500,000. As agreed, the Christos provided the $250,000 bid deposit in the form of a cashier's check, which had been contributed to by various

members of the Panama City community, including Irene Laurette Christo.

After that, however, Padgett refused to comply with the terms of his Agreement with Christo to assign the stock obtained at the foreclosure sale to the Christos' designee, thus scotching the proposed sale to Union Planters. Nevertheless, Padgett repaid John Arnold, an associate of the Christos, and Irene Laurette Christo the $25,000 and $10,000 they, respectively, had contributed to the original $250,000 cashier's check Padgett had used as the down payment on the Bay Bank stock. In addition, Padgett repaid Christo himself some $9,900 as part of Padgett's vow "to pay him what I owe him." As a result of his breach of the Agreement, Padgett has maintained his control of Bay Bank, over which he presides as Chairman of the Board of Directors, and which has risen in value from approximately $14 million at the time of the SouthTrust sale to some $25 million today.

Proceedings Below

On November 14, 1997, the Christos filed an action (the "State Action") against Padgett in the Fourteenth Judicial Circuit in and for Panama City, Bay County, Florida. In their Complaint, the Christos asserted four claims based on Padgett's breach of the Agreement, all arising under state law. The Christos demanded a jury trial in the State Action.

On December 5, 1997, Padgett filed a Notice of Removal removing the State Action to the United States District Court for the Northern District of Florida on a variety of grounds.

On January 12, 1998, the Christos filed a Motion to Remand, contesting the bases for removal of the State Action asserted in the Notice of Removal. The Motion to Remand was eventually denied by the district court in its October 1, 1998 Order (the "Remand Order").

On March 19, 1998, Padgett and William J. Miller Jr., as trustee in bankruptcy for Christo,[1] entered into a settlement agreement (the "Settlement Agreement") purporting to settle not just the claims made in the State Action by Christo, the bankruptcy debtor, against Padgett, but the claims made by the nondebtor parties, Christo's children, as well. On April 28, 1998, Padgett filed his motion seeking to obtain the district court's approval of the Settlement Agreement, and the dismissal of the State Action pursuant to the Settlement Agreement. On June 30, 1998, the district court held a one-day evidentiary hearing, as part of Christo's bankruptcy proceeding, to consider the propriety of approving the Settlement Agreement.

On July 14, 1998, the district court entered its Order (the "Referral Order") referring Padgett's motion to approve the Settlement Agreement to the bankruptcy court for a report and recommendation as to whether the motion should be granted. As part of the Referral Order, the district court found, based solely on the evidence presented at the June 30 hearing, that neither Christo nor any of his children had any claim against Padgett based on the Agreement between Christo and Padgett.

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[1]Christo filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code on February 16, 1994.

On October 1, 1998, the district court entered the Remand Order denying the Christos' Motion to Remand and granting Padgett's Motion to Dismiss the State Action. On October 7, 1998, the bankruptcy court entered its Order recommending approval of the Settlement Agreement, and the district court granted Padgett's motion to approve the Settlement Agreement on October 22, 1998.

On August 25, 2000, the United States Court of Appeals for the Eleventh Circuit filed its decision (1) concluding that it was without jurisdiction to review the district court's decision not to remand the State Action, and (2) affirming the district court on all other grounds.

Basis For Federal Jurisdiction In The Court Of First Instance

The Christos contend that there was no valid basis for federal subject-matter jurisdiction in the court of first instance. The district court concluded that it had in rem jurisdiction, as well as jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

ARGUMENT

I. BY PERMITTING THE DISTRICT COURT TO ADDRESS THE MERITS OF THE STATE ACTION BEFORE IT HAD SATISFIED ITSELF OF ITS JURISDICTION OVER THE SUBJECT MATTER, THE ELEVENTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Christos filed the State Action on November 14, 1997. After Padgett removed the State Action to the district court, the Christos, on January 12, 1998, filed a Motion to Remand the State Action to state court on the ground that the district court did not have subject-matter jurisdiction to hear the case. The Motion to Remand was not decided by the district court until October 1, 1998, some nine and one-half months after the motion was originally filed. In the meantime,

however, the district court, on July 14, 1998, entered the Referral Order, in which the district court decided the merits of the Christos' state law claims. By permitting the district court to rule on the merits of the State Action before it had satisfied itself of its jurisdiction over the subject matter, the Eleventh Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

In *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), this Court rejected the doctrine of "hypothetical jurisdiction," which had been used by at least five different courts of appeals, including the Eleventh Circuit, *see Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996), as a means of deciding a case on the merits without having to resolve difficult questions concerning the court's jurisdiction to hear the case under Article III of the United States Constitution. In so doing, this Court reviewed the "long and venerable line" of its cases reflecting the notion that the jurisdictional issue must always be addressed *before* considering the merits of the case so as not to offend fundamental principles of separation of powers:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the

court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. [449, 453 (1900)]. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884).

This Court's insistence that proper jurisdiction appear begins at least as early as 1804, when we set aside a judgment for the defendant at the instance of the losing plaintiff *who had himself* failed to allege the basis for federal jurisdiction. *Capron v. Van Noorden*, 2 Cranch 126 (1804). Just last Term, we restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy:

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U. S. 237, 244 (1934). *See Juidice v. Vail*, 430 U. S. 327, 331-332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the

> defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted)." *Arizonans for Official English v. Arizona*, 520 U. S. 43, 73 (1997), quoting from *Bender v. Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986) (brackets in original).

Steel Co., 523 U.S. at 94-95.

Thus, in light of its long history of requiring that jurisdictional concerns be addressed before the cause-of-action question, this Court held in *Steel Co.*

> that Article III of the United States Constitution requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. "For a court to pronounce upon [the merits] when it has no jurisdiction to do so," *Steel Co.* declared, 'is . . . for a court to act ultra vires.'"

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) (quoting *Steel Co.*, 523 U.S. at 101-02). This holding of the *Steel Co.* case is directly applicable in the context of a bankruptcy case, like this one, involving remand/abstention issues, as is demonstrated by the decision of the Fifth Circuit

in *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925 (5th Cir. 1999).[2]

In *Southmark*, the plaintiff corporation ("Southmark") did business in the 1980s with Drexel Burnham Lambert, Inc. ("Drexel"), the notorious junk-bond firm. Southmark's dealings with Drexel caused Southmark to suffer huge losses, and Southmark filed for Chapter 11 bankruptcy protection in 1989. As part of the bankruptcy, a court-appointed Examiner hired the accounting firm of Coopers & Lybrand L.L.P. ("Coopers") to investigate Southmark's dealings with Drexel (which, in 1990, also filed for bankruptcy). At the time of its retention, Coopers failed to disclose that it did substantial auditing work for Drexel. Coopers eventually submitted a report to Southmark that downplayed the viability of claims against Drexel based upon Southmark's ill-fated junk-bond investments. As a result, Southmark elected not to pursue these claims in the Drexel bankruptcy case.

However, in 1993, a Coopers employee went to Southmark and alleged that Coopers had thwarted his efforts to investigate the Drexel claims because (unbeknownst to Southmark) Drexel was one of Coopers' largest accounting clients. Southmark thereupon filed a disgorgement motion in the bankruptcy court, seeking reconsideration of the court's previous award of fees to Coopers for its work as the Southmark Examiner's accountant. After extensive discovery,

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[2]In their Notice of Removal, the Christos argued, among other things, that the district court did not have bankruptcy jurisdiction over the removed claims because the claims were the subject of mandatory abstention under 28 U.S.C. § 1334(c)(2).

briefing, and a hearing, the bankruptcy court awarded Southmark $585,042.48 in recovery from Coopers.

Three days later, Southmark commenced a malpractice suit against Coopers in a Texas state court. Southmark's state law causes of action for breach of contract, fraud, breach of fiduciary duty, and negligent misrepresentation alleged that Coopers' conduct caused it to suffer damages, including the total fees it paid Coopers during its bankruptcy case and the amounts it would have recovered on timely claims against Drexel. Coopers removed the case to the federal district court, which referred the action to the same bankruptcy court that had conducted Southmark's bankruptcy and the disgorgement proceeding. Southmark filed a motion for mandatory abstention, or, in the alternative, discretionary abstention or remand based in part on the argument that the state law action was a noncore proceeding and, therefore, abstention was required under 28 U.S.C. § 1334(c)(2). Coopers moved for summary judgment. The bankruptcy court granted Coopers' motion and dismissed the action as barred by both collateral estoppel and res judicata; the court denied Southmark's abstention motion as moot without expressly addressing its merits.

On appeal, the Fifth Circuit did not mince words in taking the lower court to task for not deciding the abstention issue before ruling on Coopers' motion for summary judgment:

> [T]he bankruptcy court should have decided the jurisdiction/abstention issues before reaching the preclusion issues. *Marathon Oil Co. v. Ruhrgas*, 145

> F.3d 211 (5th Cir. 1998) (en banc), *cert. granted*, 119 S.Ct. 589 (1998). Its diffidence may understandably have been related to its uncertainty whether Southmark's claims invoke core or non-core jurisdiction. But no pussy-footing around is allowed on jurisdictional issues.

Id. at 929.[3] While the court eventually held that abstention under § 1334(c) was not required in that case because Southmark's state law malpractice claim was a core proceeding (since the claim arose directly out of Southmark's bankruptcy), the import of the *Southmark* case for purposes of this case is clear: Issues of jurisdiction/remand/abstention must be decided before the court can proceed to consider the merits of the case.

Here, the district court "pussy-footed" around on the jurisdiction/remand/abstention issue for almost ten months while it considered the merits of everything *except* the Motion to Remand, despite the fact that (unlike in *Southmark*) the State Action is undeniably a noncore proceeding. The Motion to Remand was filed on January 12, 1998. The district court did not rule on the Motion to Remand until October 1, 1998, when the court also granted Padgett's Motion to Dismiss the State Action, entirely on grounds of res judicata.

In the interim, the district court, among other things, (1) conducted, as part of Christo's bankruptcy case, its one-day

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[3]Although the Fifth Circuit's decision in *Ruhrgas* was eventually reversed by this Court, the proposition for which *Ruhrgas* was cited in *Southmark* was not affected by the reversal.

evidentiary hearing on the question of "the identity of any and all parties who had any enforceable agreement" with Padgett regarding the sale of Bay Bank (*See* A-36), and (2) issued, on July 14, 1998, the Referral Order (which formed the basis for the court's eventual dismissal of the State Action). In the Referral Order, the district court directly addressed the merits of the breach-of-contract claim asserted by the Christos in the State Action, finding that "there was no enforceable agreement between Padgett and Christo Jr. or between Padgett and any other member of the Christo Group regarding the sale of Bay Bank or an assignment of Padgett's rights to the bank" (A-36; *see also* A-37 ("[I]t is the determination of this Court that neither Christo Jr. nor any other member of the Christo Group has any claim against Padgett based on any agreement regarding the September 30, 1993 sale of Bay Bank or the assignment of Padgett's rights in Bay Bank")).

That the district court decided the merits of the Christos' state law cause of action before addressing the jurisdictional issues raised in the Christos' Motion to Remand is clearly demonstrated by the fact that the district court's decision to dismiss the State Action, rendered on October 1, 1998 as part of the Remand Order, was based entirely on the court's conclusion that the findings it made in the July 14, 1998 Referral Order as to the nonexistence of a contract between Padgett and Christo were res judicata on the contract issues presented in the State Action. Since the district court violated this Court's teachings in *Steel Co.* as to the necessity of engaging in the Article III jurisdictional analysis before considering the merits of the Christos' case, the district

court's pronouncements upon the merits of the case constitute an ultra vires act that should have been reversed by the Eleventh Circuit.

Instead, the Eleventh Circuit compounded the district court's error by affirming the district court's decision to dismiss the State Action on res judicata grounds. *Christo v. Padgett*, 223 F.3d 1324, 1338-40 (11th Cir. 2000) (A-27 - A-32). In so doing, the Eleventh Circuit skirted the jurisdictional issue entirely by concluding that it was without jurisdiction to review the district court's decision not to remand the State Action to state court under the language of 28 U.S.C. § 1334(c)(2) as it read from 1990 to 1994. *Id.* at 1331-32 (A-10 - A-13). However, whether or not the Eleventh Circuit is correct in its reading of the statute, the fact remains that the Eleventh Circuit still had the authority and the obligation to void the district court's ruling on the merits of the Christos' case (which the Eleventh Circuit expressly affirmed instead) because the district court had not considered its subject-matter jurisdiction before deciding the merits of the State Action, as required by this Court in *Steel Co.* In other words, whether or not it had jurisdiction to review the district court's decision not to remand, the Eleventh Circuit always had "jurisdiction" to require that the district court follow this Court's mandate in *Steel Co.* by satisfying itself of its own subject-matter jurisdiction before proceeding to enter a ruling on the merits of the State Action. By permitting the district court to do just the opposite, the Eleventh Circuit decided an important federal question in a way that conflicts with the relevant decision of this Court in *Steel Co.*

II. BY PERMITTING THE DISTRICT COURT TO DISMISS THE STATE ACTION, IN WHICH A JURY TRIAL WAS REQUIRED UNDER THE SEVENTH AMENDMENT, ON THE BASIS OF FACTS FOUND BY THE DISTRICT COURT AFTER A ONE-DAY EVIDENTIARY HEARING, THE ELEVENTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In addition to raising concerns under constitutional separation-of-powers principles, the Eleventh Circuit's decision also presents problems under the Seventh Amendment to the Constitution. The Seventh Amendment preserves the right of trial by jury in all suits at common law. *See also* Fed. R. Civ. P. 38(a) (preserving inviolate the right of trial by jury as declared by the Seventh Amendment). The right to a jury trial is expressly given in actions removed to federal court generally, *see* Fed. R. Civ. P. 81(c), as well as in actions removed to a bankruptcy court in particular. *See* Fed. R. Bankr. P. 9015(a) (incorporating Fed. R. Civ. P. 81(c) "insofar as it applies to jury trials"). Thus, a plaintiff cannot be deprived of his constitutional right to a trial by jury simply because his state law case has ended up in a federal court, bankruptcy or otherwise.

In determining whether the Christos have been deprived of their constitutional rights in this case, it is instructive to examine the interplay between Fed. R. Civ. P. 56 and the Seventh Amendment right to a jury trial. The standards for consideration of a motion for summary judgment under Rule 56 are familiar. A motion for summary judgment is properly granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the moving party bears the burden of demonstrating that there is no dispute as to any material fact in the case, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

Although it is incumbent upon the responding party to set forth specific facts showing that there is a genuine issue for trial if the moving party has carried his initial burden, Fed. R. Civ. P. 56(e), "[t]he burden on the nonmoving party is not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2727, at 490 (3d ed. 1998). Facts asserted by the nonmoving party must be

regarded as true if they are supported by affidavits or other evidentiary material. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

While this Court has held that the summary judgment procedure does not deprive a plaintiff of his right to a jury trial where material facts are not in issue, *see Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902),

> in order to assure that this right [to a jury trial] is protected, the federal courts take great care not to deny the nonmoving party a full trial once it is shown that a genuine issue of fact exists or that the judgment ultimately might depend on the credibility of witnesses; the courts do not attempt to try fact issues when ruling on the motion.

10A Wright et al., *supra,* § 2714, at 251-52 (footnote omitted); *see also Anderson*, 477 U.S. at 255 ("Our holding that the . . . standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis").

In light of these concerns, summary judgment is generally considered to be inappropriate where, as here, the essence of the case is "a factual dispute regarding the existence of a valid and binding agreement." *Cabarrocas v. RTC*, 840 F. Supp. 888, 890 (S.D. Fla. 1993) (quoting 10B Wright et al., *supra*, § 2730.1, at 68); *see also Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1297-98 (11th Cir. 1983) (in action on contract claims for transportation by plaintiff of coal for defendant, summary judgment was precluded where substantial fact issue existed as to whether defendant contracted with plaintiff for transportation of the coal). This is especially true in the case of an oral contract where there are factual disputes "about what the parties intended." 10B Wright et al., *supra*, § 2730.1, at 77-78 (citing numerous cases in which courts have denied summary judgment because there existed a factual issue as to whether the parties had entered into an oral contract).

In this case, the Christos have produced substantial evidence tending to show that there was, in fact, an oral agreement between Christo and Padgett regarding the transfer of the Bay Bank stock to the Christos' designee if Padgett were the high bidder at the SouthTrust foreclosure. That evidence is both documentary and testimonial, including statements made by Christo and third parties, such as Rick Jenson, the individual who agreed to bid on the Bay Bank stock if Padgett was not available, and Benjamin Rawlins, the Chairman of the Board of Union Planters, who concluded in his deposition that Padgett had acted as the Christos' "stalking horse" in bidding on the Bay Bank stock on their behalf.

In spite of all the evidence presented by the Christos to the contrary, the district court, after conducting its one-day evidentiary hearing in Christo's bankruptcy proceeding, concluded, in the Referral Order, that there was no oral agreement between Padgett and Christo as a matter of law (A-36 - A-37). In making that determination, the district court noted that the Christos had, in fact, presented evidence to the contrary; however, the court specifically found "that such evidence is not credible and deserves no weight" (A-37). In so doing, the district court clearly usurped the function of the finder of fact in a case that should have been tried before a jury. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"); *accord Hunt v. Cromartie*, 526 U.S. 541 (1999) (district court erred in resolving disputed fact of motivation at the summary judgment stage).

In affirming the district court's decision to dismiss the State Action, the Eleventh Circuit put its imprimatur on the district court's inappropriate weighing of the evidence presented by the Christos, concluding that "the district court properly granted summary judgment to Padgett based on the lack of evidence of an agreement between Padgett and any of the Christo children." *Christo*, 223 F.3d at 1340 (A-32). In fact, the Eleventh Circuit went so far as to review all of the same evidence weighed and considered by the district court before going along with the district court's finding that the Christos' evidence "was 'not credible and deserves no weight." *Id.* at 1336 (A-22 (quoting the district court's

opinion)). In undertaking this exercise, the Eleventh Circuit applied a "clear error" standard to its "review [of the] district court's factual findings" (A-22). While this standard might be appropriate in the context of reviewing facts found in a bench trial, it clearly demonstrates the nature of the Eleventh Circuit's error in approving a summary judgment decision in a case where the finding of facts was supposed to be done by a jury, and not at all by the district court. As such, the Eleventh Circuit expressly sanctioned the district court's departure from the summary judgment standards established by this Court in its 1986 trilogy of summary judgment cases.

In the course of approving the district court's jury-like consideration of the evidence presented by the Christos at the one-day evidentiary hearing, the Eleventh Circuit gave short shrift to the Christos' Seventh Amendment argument, dismissing it out of hand in a single footnote at the end of the court's opinion. That footnote states:

> The Christos' argument that a finding of issue preclusion denied them the right to have a jury hear their claims against Padgett is unavailing. "The determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to a jury in that subsequent action if collateral estoppel did not apply." Restatement (Second) Judgments § 27 cmt. d (1982).

Id. at 1340 n.49 (A-32 n.49).

The Eleventh Circuit's perfunctory consideration of the Christos' constitutional argument demonstrates a serious

misapprehension of the nature of the Christos' argument. The Christos did not argue that the district court's dismissal of the State Action on res judicata grounds denied them the right to have a jury hear their claims against Padgett. Rather, the Christos' position is now, and always has been, that they were denied their right to a jury trial on their state law claims when the district court decided the merits of those claims on the basis of the court's weighing of the evidence presented at a one-day evidentiary hearing rather than the constitutionally mandated jury trial.

The procedural history of this case shows the injustice that has been done to the Christos in stark relief. This case began when the Christos brought a simple state law breach-of-contract action against Padgett in state court, where the Christos requested a jury trial. In that State Action, the Christos sought to have a judgment as to (1) whether there was an oral agreement between Padgett and Christo, and, if so, (2) whether it had been breached by Padgett. Those questions are almost always factual ones that are decided by the jury. The State Action was then removed to federal court where it was, in essence, consolidated with Christo's preexisting bankruptcy case, despite the presence of nondebtor parties in the State Action. As part of the bankruptcy proceeding, the district court held a one-day evidentiary hearing on the question of "the identity of any and all parties who had any enforceable agreement" with Padgett regarding the sale of Bay Bank (*see* A-36), which was the precise question presented in the State Action. Solely on the basis of the evidence presented at that one-day evidentiary

hearing the district court decided the merits of the Christos' breach-of-contract claims, finding that "there was no enforceable agreement between Padgett and Christo Jr. or between Padgett and any other member of the Christo Group regarding the sale of Bay Bank or an assignment of Padgett's rights to the bank" (A-37). In reaching that conclusion, the district court gave full credence to the testimony of Padgett, the only witness who testified that there was no such agreement with the Christos, while completely discounting all of the contrary evidence presented by the Christos because "such evidence is not credible and deserves no weight" (A-37).

In sum, the district court effectively granted summary judgment as to the Christos' state law claims despite the presence of genuine issues of material fact as to whether there was an oral agreement between Christo and Padgett relating to the transfer of Bay Bank to the Christos' designee after the completion of the SouthTrust foreclosure sale. The district court impermissibly resolved those issues in favor of Padgett by weighing the evidence and by resolving any inferences to be drawn from that evidence in favor of Padgett, the moving party. Under these circumstances, it is all too clear that the Christos were deprived of their Seventh Amendment right to have their case tried by a jury. Nevertheless, the Eleventh Circuit approved the deprivation by affirming the district court's dismissal of the State Action after engaging in its own weighing of the evidence. In so doing, the Eleventh Circuit decided an important federal question in a way that conflicts with the relevant summary judgment decisions of this Court.

CONCLUSION

For all of the foregoing reasons, the Petitioners request this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

JOHN H. CHRISTO JR., JOHN CHRISTO III, JAMES PHILLIP CHRISTO, and IRENE LAURETTE CHRISTO,

Petitioners,

v.

KENNETH EARL PADGETT,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3577

D.C. Docket No. 97-00320-5-CV

JOHN CHRISTO, JR., JOHN CHRISTO, III, JAMES PHILLIP CHRISTO, IRENE LAURETTE CHRISTO,

Plaintiffs-Appellants,

versus

KENNETH EARL PADGETT,

Defendant-Appellee.

No. 98-3663

IN RE: JOHN CHRISTO, JR.,

Debtor.

JOHN CHRISTO, JR.,

Plaintiff-Appellant,

versus

WILLIAM MILLER, Trustee,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(August 25, 2000)

Before BLACK, CARNES and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

As we embark on this appeal, we must, in the apt words of the district court, "trudge down a long and winding road"[1] that has as much to do with the extensive history behind the original complaint as it does with the procedural complexities in its wake. The appeal requires us to consider, as a matter of first impression in this circuit, the interplay between the removal and remand statutes in relation to a pending bankruptcy case as well as the extent of our ability to review remand decisions in this context. We then evaluate the district court's denial of a recusal motion, its approval of a settlement agreement, and its grant of summary judgment on the ground of issue preclusion. We conclude that we are without

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[1]Order, Sept. 30, 1998, at 2, *in* R6, Tab 98.

jurisdiction to review the district court's decision not to remand to the state court; we affirm the district court on all other grounds.[2]

I. BACKGROUND AND PROCEDURAL HISTORY

This appeal comes after a decade of civil, criminal, and bankruptcy proceedings concerning the Christo family and their investments in Bay Bank & Trust ("Bay Bank"). In the early 1990s, all of the outstanding stock of Bay Bank was owned by Florida Bay Banks ("FBB"), a one-bank holding company. The majority of FBB's stock was owned by the J.C.J. Irrevocable Trust Agreement ("J.C.J. Trust") and the Bay Bank Company Employee Stock Ownership Plan ("ESOP"). John Christo, Jr. ("Christo, Jr.") established the J.C.J. Trust for the benefit of his three children, John Christo, III ("Christo, III"), James Phillip Christo ("Phillip Christo"), and Irene Christo. Christo, III was the Trustee of both the J.C.J. Trust and the ESOP. All three Christo children owned additional shares of common and preferred stock through the ESOP and individually. Christo, Jr.

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[2]Carried with this appeal was Padgett's motion to dismiss the appeal for want of jurisdiction due to the Christos' lack of standing to assert any claims that became property of the estate. This argument is merely the obverse of the issues raised in this appeal as we would have had to consider all of the issues addressed herein before determining whether the Christos had standing. We therefore deny the motion to dismiss the appeal as moot.

individually owned approximately 97% of the preferred stock of FBB.

FBB defaulted on a $4.5 million loan from SouthTrust Bank secured by all of FBB's stock in Bay Bank and guaranteed individually by Christo, Jr. Litigation between the Christos and SouthTrust ("the SouthTrust litigation") led to a settlement agreement providing for a court-ordered sale of the Bay Bank stock. The impending auction imperiled the Christos' ongoing negotiation with Union Planters Corporation ("Union Planters") for a stock purchase of Bay Bank because Union Planters could not complete its due diligence prior to the date of the auction, and Union Planters was unsuccessful in postponing the auction for additional time in which to consummate the deal.

The auction was scheduled for September 30, 1993. The night before the auction, Christo, Jr. contacted a lifetime friend and former officer of Bay Bank, Kenneth Earl Padgett, and asked him to attend the auction and purchase Bay Bank. Christo, Jr. provided Padgett a cashier's check for $250,000, cobbled from various sources, to secure Padgett's ability to bid. According to Christo, Jr., Padgett attended the auction with the understanding that, if Padgett were the successful bidder, he would assign his bid to Union Planters. Padgett refutes that such an agreement ever existed and contends that, although he considered the purchase out of respect for his friendship with Christo, Jr., his decision to bid on the auctioned bank was for his profit alone.

At the auction, Padgett and SouthTrust were the major bidders for the Bay Bank stock, and Padgett was the

successful bidder with a final bid of $8.5 million. Shortly after the auction, SouthTrust filed pleadings with United States District Court Judge Lacey A. Collier, who had presided over the earlier SouthTrust litigation and settlement. SouthTrust sought to set aside Padgett's purchase on the basis that he was merely a "strawman" for Christo, Jr., which would foreclose regulatory approval, and also sought to re-auction the Bay Bank stock. The district court conducted a contempt hearing on November 16, 1993, at which it directed the Christo family, Padgett, and others to appear to show cause why they should not be held in contempt of the court's prior order directing the sale of the Bay Bank stock. At that hearing, Padgett testified that he acted on his own, and denied that there had ever been an agreement between he and the Christos concerning the purchase of Bay Bank. The Christos did not present any contrary evidence. The court denied SouthTrust's motion to set aside the sale, but reserved ruling on the motion for contempt.[3]

While Padgett awaited final regulatory approval for his purchase of Bay Bank, Christo, Jr. filed a bankruptcy petition under Chapter 7 on February 16, 1994. In the petition, Christo, Jr. did not list as property of his estate any interest in Bay Bank or any contractual rights with Padgett. In 1996, upon information received from one of the Christo children, the Trustee in Christo, Jr.'s bankruptcy case, William Miller, filed a four-count complaint against Padgett based on an alleged breach of an oral contract to turn over control of Bay

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[3]It appears the district court never ruled on this motion.

Bank to the Christos ("the Miller litigation"). The Trustee voluntarily dismissed the two claims seeking to enforce the alleged oral agreement and unsuccessfully litigated the remaining claims. Miller initially filed a notice of intent to abandon the dismissed claims, but Padgett objected. Miller and Padgett then reached a settlement agreement on all claims relating to the sale of the Bay Bank stock; the settlement was contingent on the court finding that the Trustee had succeeded to any claim relating to Padgett's alleged agreement to buy Bay Bank on behalf of the Christos.

On November 14, 1997, the Christo family filed a complaint against Padgett in Florida state court in which they alleged that Padgett breached an oral contract with Christo, Jr. to purchase Bay Bank at auction on their behalf ("the Christo litigation").[4] Padgett removed the case to federal court, after which it was transferred to Judge Collier. The Christo family moved to remand and for the judge's recusal. The district court deferred ruling on the motion to remand but denied the request for recusal.

After the Trustee and Padgett moved for the district court to approve the settlement in the Miller litigation, Christo, Jr. objected, and the court held an evidentiary hearing, applicable

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[4]Padgett suggests that the Christos' complaint should be barred by the statute of limitations because they were first notified that he denied the existence of a contract in documents served on November 12, 1993. Because there is some question about whether the documents were received on that date, *see* Tr. of June 30, 1998 Hr'g at 11-23, *in* R11 (testimony of Irene Christo), we would not affirm the district court's dismissal on this basis.

to both the Miller and Christo litigations, concerning any alleged agreement between Padgett and the Christo family. In a July 13, 1998 Order, the court found that there was no enforceable agreement, and that even if there were, it would only have been between Padgett and Christo, Jr., in which case Christo, Jr.'s interest in the agreement would have passed to his bankruptcy estate. The district court then referred the proposed settlement to the bankruptcy court for a Report and Recommendation on whether, in light of the district court's findings, the proposed settlement was in the best interest of Christo, Jr.'s estate.

On October 1, 1998, the district court denied the Christos' earlier motion to remand and dismissed their civil lawsuit on grounds of issue preclusion based on its findings in the July 13 order. The bankruptcy court recommended approving the proposed settlement and, on October 22, 1998, the district court adopted the recommendation and approved the settlement between Padgett and the Trustee. We hear this matter on a consolidated appeal.[5]

II. DISCUSSION

A. Removal and Remand

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[5]Although the district court consolidated the two causes of action for the purpose of different oral arguments, *see* Order, Jan. 6, 1998, *in* R1, Tab 16; Order, Jan. 29, 1998, *in* R2, Tab 42, it ultimately denied Padgett's motion to consolidate as moot after it dismissed the Christos' complaint, *see* Order, Sept. 30, 1998, *in* R6, Tab 94.

In response to the Christos' state court complaint, Padgett timely sought removal to the United States District Court for the Northern District of Florida,[6] where Christo, Jr.'s bankruptcy case was pending; the Christos responded with a motion to remand.[7] In their remand motion, the Christos requested both that the district court abstain as mandated by 28 U.S.C. § 1334(c)(2), and remand on prudential grounds as warranted by 28 U.S.C. § 1452. Section 1334 provides district courts with "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive

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[6]Courts have split on whether 28 U.S.C. § 1446(b) (governing removals generally) or Bankruptcy Rule 9027 provides the appropriate time period for filing a notice of removal in cases related to a bankruptcy proceeding. *See* Hon. Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. 1037, 1057-59 (1997). Under either provision, however, Padgett's removal, sought within 30 days, was timely. *See id.*

[7]It is less clear whether the Christos' remand motion, filed 38 days after the Notice of Removal, was timely because the statute does not define "timely," and the Bankruptcy Rules provide no guidance on this issue. Courts appear to have adopted a case-by-case approach. *See, e.g., Adams v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Auth. (In re Adams)*, 133 B.R. 191, 195 (Bankr. W.D. Mich. 1991) (remand sought 21 days after removal was timely); *Strutz v. Hoechst Celanese Corp. (In re United States Brass Corp.)*, 173 B.R. 1000, 1004 (Bankr. E.D. Tex. 1994) (remand motion filed 13 days after removal was timely); *Waugh v. Eldridge (In re Waugh)*, 165 B.R. 450, 452 (Bankr. E.D. Ark. 1994) (unexcused delay of four months after removal was not timely). Padgett has not challenged the timeliness of the remand motion and we will assume, without deciding, that a motion for remand filed 38 days after removal is timely for purpose of § 1334.

jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §§ 1334(a) & (b) (2000). Section 1452 provides that "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Id. § 1452(a).

1. *Does Mandatory Abstention Apply in Removed Cases?*

As an initial matter, we address a controversy that has arisen among other courts: whether mandatory abstention under § 1334(c)(2) applies to cases removed under § 1452. Several courts, focusing on § 1334(c)(2)'s requirement that "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction," have concluded that a parallel state court proceeding is a prerequisite of mandatory abstention. Under this interpretation, once a state law action is removed, there no longer remains an action "commenced . . . in a State forum." See, e.g., Southern Marine & Indus. Servs., Inc. v. AK Eng'g, Inc. (In re AK Servs., Inc.), 159 B.R. 76, 83-84 (Bankr. D. Mass. 1993); Paul v. Chemical Bank (In re 666 Assocs.), 57 B.R. 8, 12 (Bankr. S.D.N.Y. 1985).

The vast majority of courts, however, have concluded to the contrary on the reasoning that the removed state law action has been "commenced" and, upon remand, would remain capable of timely adjudication in state court. *See*

Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.), 163 F.3d 925, 929 (5th Cir. 1999); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 584 n. 3 (6th Cir. 1990); *Williams v. Shell Oil Co.*, 169 B.R. 684, 690-92 (S.D. Cal. 1994); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 869 n.7 (N.D. Ill. 1991). In our view, this latter interpretation better comports with the plain language of § 1334(c)(2) as well as Congress's intent that mandatory abstention strike a balance between the competing interests of bankruptcy and state courts. *See* 130 Cong. Rec. S8,8889 (daily ed. June 29, 1984) (statement of Sen. Dole) (describing the original mandatory abstention provision as a compromise between the House and Senate "that preserved the integrity of bankruptcy jurisdiction while allowing abstention for personal injury cases where they can be timely adjudicated in State courts"). We therefore hold that § 1334(c)(2) applies to state law claims that have been removed to federal court under § 1452(a).

2. *Review of the District Court's Remand Decision*

Section 1334(c)(2), enacted in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, July 10, 1984, 98 Stat. 333, originally provided that "[a]ny decision to abstain made under this subsection is not reviewable by appeal or otherwise." In 1990, Congress amended section 1334(c)(2) to remove appellate review from all decisions to abstain or not to abstain. *See* Collier on Bankruptcy § 3.05[6][a] (Lawrence P. King, ed. 15th rev. ed.

2000). With the Bankruptcy Reform Act of 1994, Congress renumbered § 1334 and recreated appellate review only for those decisions by a district court *not* to abstain under § 1334(c)(2), the new mandatory abstention provision. *See* 28 U.S.C. § 1334(d) (2000). The Christos argue that the district court was required to abstain under § 1334(c)(2) because: (1) he made a timely motion to remand; (2) in a proceeding based upon a state law claim or state law cause of action; (3) that was related to a case under title 11 but not arising under title 11 or arising in a case under title 11; (4) which could not have commenced in federal court absent jurisdiction under § 1334; and (5) which has been commenced and can be timely adjudicated in a state forum of appropriate jurisdiction.

Before we consider whether the elements of mandatory abstention were present, we must first determine whether § 1334(d), which would grant us power to make that consideration, applies in this case. Section 1334(d) was one of many amendments to the bankruptcy code in the 1994 Act. The 1994 Act provided that its amendments to the Code were, with limited exception, prospective and therefore would apply only to cases filed after the effective date of the Act, October 22, 1994. As applied to § 1334(d), the legislative history is clear that:

> subsection (b) operates prospectively and applies only to cases filed after the effective date of the Act. Accordingly, it does not make existing orders appealable. Any future decisions not to abstain, if made in cases filed before the effective date of the Act, would [] be governed by present law and thus

would not be appealable to the Circuit Court of Appeals.

H.R. Rep. No. 103-835 at 37. What is less clear, however, is whether the term "cases" as used in the Act and its history refers to the bankruptcy case or the civil case which was removed. Because Christo, Jr.'s bankruptcy petition was filed before the October 22, 1994 enactment date, and his civil case filed after, this distinction is critical to our determination of our jurisdiction to review the district court's remand decision.

Although at first blush the civil case would appear to be the determining case, the language used throughout the Act suggests otherwise. The 1994 Act consistently, even if not constantly, denotes the original bankruptcy case filed under Title 11 as "case" and applies other terms, such as "proceedings" or "actions," to other causes of action. This practice dates back to the original Bankruptcy Act of 1978, in the which the term "case" referred to the original bankruptcy petition. *See Young v. Sultan Ltd. (In re Lucasa Int'l Ltd.)*, 6 B.R. 717, 719 n.5 (Bankr. S.D.N.Y. 1980) ("In the context of the jurisdictional grants given by the 1978 statute, the word 'case' refers to the commencement of a bankruptcy by the filing of a petition by a debtor under Sections 301-303 [of the Bankruptcy Code]"); Hon. Roy Babitt, *The Bankruptcy Court, Its Judges, Their Jurisdiction and Powers and Appeals, Under Title II of the 1978 Bankruptcy Reform Act: Transition and Beyond*, 1979 Ann. Surv. Bankr. L. 89, 103 (emphasizing "that the word 'case' here means the commencement of the Bankruptcy Court's judicial and administrative process from the filing of the petition"), *quoted in* Ralph Brubaker, *On the*

Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743, 941 n.359 (2000).

Further support derives from the assumption, albeit without discussion, by most courts and commentators that the filing of the bankruptcy case determines the applicability of the 1994 Act. *See In re Southmark*, 163 F.3d at 928-29; *Security Farms v. International Broth. of Teamsters*, 124 F.3d 999, 1009 n.9 (9th Cir. 1997); Collier on Bankruptcy, *supra*, § 3.05[6][a]. *But cf. Schuster v. Mims (In re Rupp & Bowman Co.)*, 109 F.3d 237, 238-39 (5th Cir. 1997) (using date of amended state law claim to determine when § 1334(d) governs). Finally, the Act's application provision states unequivocally that "the amendments made by this Act shall not apply with respect to cases *commenced under Title 11* of the United States Code before the date of the enactment of this Act." The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 702(b), 108 Stat. 4106, 4150 (emphasis added).

Based on the foregoing, we conclude that the date on which the original bankruptcy case was filed under Title 11 of the United States Code determines whether § 1334(d) applies. Because Christo, Jr. filed his bankruptcy petition on February 16, 1994, several months before the effective date of the 1994 Act, section 1334(d) does not apply; we therefore are without jurisdiction to review the district court's decision not to remand under § 1334(c)(2).[8]

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[8]Nor would we have power to review a declination of remand on any other grounds. The review afforded under § 1334(d) does not apply to §

B. Motion to Recuse

Shortly after the Christos' state law claims were transferred to Judge Collier, the Christos moved for his recusal pursuant to 28 U.S.C. § 144. The judge denied the motion after considering both 28 U.S.C. §§ 144 and 455.[9] We review a district court's refusal to recuse for abuse of discretion. *See Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 384-85 (11th Cir. 1991); *United States v. Meester*, 762 F.2d 867, 885 (11th Cir. 1985).[10]

Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein.

1334(c)(1), which provides for discretionary remand, and decisions not to remand for equitable reasons pursuant to § 1452 are "not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title." 28 U.S.C. § 1452(b) (2000).

[9]The judge, noting that no motion was required, considered *sua sponte* whether it was appropriate to recuse himself under 28 U.S.C. § 455. *See* Order, Jan. 28, 1998, at 4, *in* R2, Tab 41.

[10]Padgett suggests that the Christos should have sought review of the judge's refusal to recuse by writ of mandamus; recusal orders, however, are reviewable on appeals from final judgment. *See Diversified Nurismatics*, 949 F.3d at 384.

28 U.S.C. § 144 (2000). To warrant recusal under § 144, the moving party must allege facts that would convince a reasonable person that bias actually exists. *See Phillips v. Joint Legislative Comm. on Performance & Expenditure Rev.*, 637 F.2d 1014, 1019 n.6 (5th Cir. Unit A Feb. 1981).[11] Properly pleaded facts in a § 144 affidavit must be considered as true. *See id.* at 1019.

Section 455 requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned" or "[w]here he has a personal bias or prejudice concerning a party." 28 U.S.C. §§ 455(a) & (b)(1) (2000). Under § 455, the standard is whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality. *See United States v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989).

In his affidavit supporting the recusal motion, Christo, Jr. emphasizes two examples of Judge Collier's alleged bias: (1) his disparaging remarks concerning the Christos' "Never" campaign;[12] and (2) his sentencing, which was later reversed

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[11]Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent on this court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[12]The "Never" public relations campaign represented the Christo family's opposition to SouthTrust (or any other "outsider") obtaining control of Bay Bank as a result of SouthTrust's foreclosure. During the November 16, 1993, contempt hearing, Judge Collier referred to the "Never" campaign several times. As illustration, Christo, Jr. cites Judge Collier's statement that:

Anyone who uses court proceedings for personal endeavors or

on appeal, of Christo, III on an erroneous conviction for money laundering.[13]

Neither of these grounds warranted Judge Collier's recusal. As for the judge's statements concerning the "Never" campaign, the Supreme Court has held that "judicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extra-judicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994). Evidence of the "Never" campaign was, among other things, presented to the court in newspaper articles attached

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> publicity advantage to me is engaged in contemptuous conduct, and this court will not be used to further any personal agenda by anyone, either side. The court process is simply not to be a part of any circus whatsoever. Press conferences to file lawsuits, to have Never campaigns, use the court in that campaign certainly is borderline conduct for any party that is before the court, and it will simply not be tolerated.

Christo, Jr. Aff. ¶ 14, *in* R1, Tab 34.

[13]On appeal, this court found insufficient evidence of money laundering and remanded with instructions to sentence Christo, III for a lesser offense. *See United States v. Christo*, 129 F.3d 578, 581 (11th Cir. 1997). It bears mention, however, that Judge Collier also awarded Christo, Jr. an extremely light sentence for his conviction of conspiracy to defraud a bank. *See* Christo, Jr. Dep. at 27, *in* R3, Tab 67, Ex. 2.

to filed motions,[14] and there is no evidence that Judge Collier formed an opinion about the campaign based on extra-judicial sources. In addition, Judge Collier's admonition that the court would not be used to further the personal agenda of either party reveals no improper partiality or hostility to either party. Nor did Judge Collier's occasional expressions of frustration with the Christo family warrant recusal.[15] *See Hamm v. Members of Bd. of Regents*, 708 F.2d 647, 651 (11th Cir. 1983) ("Neither a trial judge's comments on lack of evidence, rulings adverse to a party, nor friction between the court and counsel constitute pervasive bias."). Indeed, in light of the somewhat arduous path this litigation has followed, Judge Collier demonstrated commendable equanimity during all proceedings.

We also reject the suggestion that the judge's prior sentencing of Christo, III and his having presided over other

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[14]*See* Tr. of Nov. 16, 1993 Hr'g at 25, *in* R1, Tab 13, Ex. 1. Judge Collier mentioned this during oral argument on the recusal motion. *See* Tr. of Jan. 23, 1998 Hr'g at 16, *in* R9, Tab 48.

[15]The Christos' chief example is Judge Collier's remark at the November 16, 1993, contempt hearing:

> [A]t the outset, the Court wants to make it crystal clear to all involved in this case, parties and counsel, that it intends to get to the bottom of this mess, including the question of whether Mr. Padgett's purchase of the stock was a legitimate purchase, or whether he was merely a "strawman" for the Christos, and rue the day should the Court discover that the transaction was a sham.

Christo, Jr. Aff. ¶ 5, *in* R1, Tab 34.

litigation involving the Christo family required his recusal from this case. Although Judge Collier had heard the evidence leading to Christo, III's conviction, there is nothing in Christo, Jr.'s affidavit that would cast doubt on Judge Collier's impartiality. The mere fact of having presided over previous criminal or civil trials involving the same parties does not mandate recusal from all future litigation involving those parties. *See Steering Comm. v. Mead Corp. (In re Corrugated Container Litig.)*, 614 F.2d 958, 964 (5th Cir. 1980); *see also Jaffe v. Grant*, 793 F.2d 1182, 1189 n.4 (11th Cir. 1986) ("Factual knowledge gained during earlier participation in judicial proceedings involving the same party is not sufficient to require a judge's recusal.").

C. Approval of Settlement Agreement

The proposed settlement between Miller and Padgett provided for: (1) a general and mutual release of all claims among all parties (e.g., Padgett's claims for sanctions and abuse of process for Miller's former suit to enforce the purported contract with Christo, Jr., and Miller's ability to revive that same suit); (2) Bay Bank's subordination of all but one of its claims against the estate; and (3) a payment by Padgett and/or Bay Bank to the estate of $10,000-$15,000, depending on the costs associated with the settlement. The agreement also called for declarations that Christo, Jr. alone owned any cause of action against Padgett for his purchase of the Bay Bank stock, that any cause of action had been

transferred to the Trustee, and that no third parties would be able to pursue such a cause of action.[16]

Based on the evidence presented at the June 30, 1998 hearing, the district court made the following preliminary findings: (1) that there was never an agreement between Christo, Jr. and Padgett for Padgett to purchase the Bay Bank stock at the foreclosure sale on behalf of the Christos; (2) that even if there had been an agreement, it was solely between Christo, Jr. individually and Padgett; and (3) that any claim Christo, Jr. might have had was transferred to the Trustee as part of the bankruptcy estate.[17] The district court then referred the settlement agreement to the bankruptcy court to determine whether, in light of its findings, the proposed settlement was in the best interests of the estate.

The bankruptcy court cited the relevant factors when reviewing a proposed settlement agreement: (1) the probability of success in litigation; (2) the difficulties to be encountered in collection; (3) the complexity, expense, inconvenience, and delay involved in the litigation; and (4) the paramount interest of the creditors. *See Wallace v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990). The bankruptcy court found that these four factors weighed in favor of approving the settlement.[18] Although the bankruptcy court noted the district court's

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[16]*See* Settlement Agreement at 7-9, *in* R7, Tab 9.

[17]*See* Order, July 13, 1998, at 3-4, *in* R7, Tab 14.

[18]*See* Report & Recommendation at 5, *in* R8, Tab 23.

finding that there was no enforceable contract between Christo, Jr. and Padgett, it found that Padgett and Bay Bank's opposition to the Trustee's abandonment of those claims to the Christos suggested that success on those claims was not out of the question. And although the bankruptcy court foresaw no difficulty in collection, it found that the complexity and expense involved in litigation were likely to be considerable. Most importantly, the bankruptcy court emphasized that approval of the settlement would allow the creditors, who had been waiting for four years, to be paid, and recommended approving the settlement.[19] The district court adopted the recommendation.[20]

The Christos challenge the settlement agreement as illegal and spurious. Arguing that all claims but Bay Bank's were "shams," the Christos contend that Padgett used the agreement to misapply Bay Bank's fund for his own benefit, and charge the Trustee as a possible abettor. In response, Padgett questions the Christos' standing either to contest the legality of the Trustee's decisions or to purport to speak on Bay Bank's behalf. Padgett also maintains the legality and propriety of the settlement agreement.[21] We review an

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[19]*See id.* at 4-5.

[20]*See* Order, Oct. 22, 1998, *in* R8, Tab 24.

[21]Padgett argues that the Christos waived their illegality argument by failing to raise it below. Although the Christos did not contest the agreement's legality in their response to Padgett's motion to approve the settlement, they did raise this issue during the June 30, 1998, evidentiary hearing, *see* Tr. of June 30, 1998 Hr'g at 33, *in* R11, and in their

approval of a settlement agreement under the abuse of discretion standard. *See Leverso v. SouthTrust Bank of Ala.*, 18 F.3d 1527, 1531 (11th Cir. 1994).[22]

We agree with Padgett that the Christos lack standing to assert Bay Bank's interest. Whether the Christos have standing to challenge the settlement agreement on any other grounds depends, in turn, on whether they had an agreement with Padgett. If such an agreement existed, any party to that agreement would have standing to protect his or her pecuniary interest in it. If there was no agreement between Padgett and the Christos, however, then the Christos would have no basis to challenge approval of the settlement agreement between Padgett and Miller.

Turning first to the terms of the agreement, we cannot agree with the Christos' characterization of the settlement agreement as possibly "the most self-serving document ever drafted."[23] Even if the likelihood of Padgett succeeding in his claim for sanctions against Miller was slight, the bankruptcy

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subsequent motion for reconsideration of the court's July 13, 1998 order, filed several months before the district court's order approving the settlement. *See* Mem. of Law in Supp. of Mot. for Reh'g and Recons. at 19, *in* R7, Tab 18.

[22]The Christos suggest that a settlement agreement is a contract and therefore should be reviewed *de novo*; this court is not interpreting the settlement agreement, however, but rather deciding whether it was properly approved.

[23]Pls.' Mem. of Law in Resp. to Def.'s Mot. to Dismiss and Opp'n to Approval of Settlement Agreement at 7 n.5, *in* R7, Tab 10.

court correctly noted that defense of any litigation, even that which is frivolous, is both time-consuming and costly.[24] Based on the findings of the district court, approving the settlement agreement was not an abuse of discretion.

This leaves the question of the propriety of the district court's findings upon which approval of the agreement was predicated. We review a district court's factual findings for clear error and its conclusions of law *de novo*. *See General Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1494 (11th Cir. 1997). The district court noted that there was some evidence of an agreement between Christo, Jr. and Padgett, but it concluded that this evidence was "not credible and deserves no weight."[25] The district court further found that, even if there had been an agreement, there was no evidence that the agreement had been between anyone other than Padgett and Christo, Jr.

After review of the record, we cannot say these findings were clearly erroneous. At the June 30, 1998, hearing, Christo, Jr., Phillip Christo, and Irene Christo[26] all testified

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[24]*See* Report & Recommendation at 5, in R8, Tab 23. Although the Christos dismiss the claim for sanctions with the observation that "[s]o rarely are sanctions awarded it is a wonder that any but the least experienced and most ill-prepared trial attorney gives the threat a second thought," Pls.' Mem. of Law in Resp. to Def.'s Mot. to Dismiss & Opp'n to Approval of Settlement Agreement at 8 n.6, *in* R7, Tab 10, we cannot agree that claims for sanctions carry so little force.

[25]Order, July 13, 1998, at 4, *in* R7, Tab 14.

[26]Christo, III did not testify at the hearing.

that Padgett had agreed to bid on the Bay Bank stock with the understanding that he would then assign his bid to Union Planters. None of them were able to articulate the particulars of this agreement, or explain what would happen if Union Planters no longer wanted the bank after Padgett bought it. The other evidence of the agreement found in the record comes primarily from Christo, Jr.'s own, often inconsistent, testimony, although there is also evidence from Phillip Christo;[27] Irene Christo;[28] Frank Wood, a former executive of Union Planters and later officer of Bay Bank and fiancé of Irene Christo;[29] Charles Hilton, frequent borrower from Bay Bank and erstwhile counsel to both Christo, Jr. and Padgett,[30] and Benjamin W. Rawlins, Jr., Chairman of the Board of Union Planters.[31] Close examination of their testimony, however, reveals that their knowledge of the agreement came almost exclusively from inferences and statements from Christo, Jr.[32] Indeed, throughout Christo, Jr.'s deposition

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[27]*See* Phillip Christo Aff. ¶ 13, *in* R5, Tab 84.

[28]*See* Irene Christo Aff. ¶ 12, *in* R6, Tab 89.

[29]*See* Wood Aff. ¶ 9, *in* R6, Tab 89.

[30]*See* Hilton Aff. ¶ 5, *in* R5, Tab 84.

[31]*See* Rawlins Dep. at 62, *in* R5, Tab 85.

[32]*See* Irene Christo Aff. ¶ 15 ("[Padgett] and my father then went into the next room alone for the purpose of discussing the changes in the side deal between Defendant Padgett and the Christo family. . . ."), ¶ 16 ("[Christo, Jr.] said that Defendant Padgett would bid on the Bay Bank stock and then assign the bid to Union Planters or to another purchaser."),

testimony, he provided scant corroboration of his version of events.[33]

In addition, we agree with the district court that the evidence presented at the June 30 evidentiary hearing suggested, at most, that Christo, Jr. and Padgett negotiated and perhaps arranged for Padgett to purchase Bay Bank for assignment to Union Planters. First, Miller testified that none of the Christo children advised him of any cause of action they might have had against Padgett.[34] Second, although

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in R6, Tab 89; Wood Aff. ¶ 9 ("[Padgett] and [Christo, Jr.] then went into the next room alone for the purpose of discussing the changes in the side deal between Defendant Padgett and the Christo family. . . ."), ¶ 10 ("[Christo, Jr.] said that Defendant Padgett would bid on the Bay Bank stock and then assign the bid to Union Planters or to another purchaser."), *in* R6, Tab 89; Hilton Aff. ¶ 5 ("It was clearly inferred that Padgett had decided not to sell the bank to a third party (pursuant to what I understood was his prior agreement with the Christo family), but rather to compensate the Christo family in cash for their equity in Bay Bank); Rawlins Dep. at 73 ("My perception is that Mr. Christo thought there was some sort of agreement between he and Padgett."), 109 ("I got the impression that Mr. Padgett was his own man."), *in* R5, Tab 85.

There is also documentary evidence of negotiations between Padgett and Union Planters for the Bay Bank Stock, but they do not necessarily reflect that such negotiations were at the behest of Christo, Jr. *See* R4, Tab 71, Ex. F.

[33]*See* Christo, Jr. Dep. at 48-49, 51, 78, 97-98, *in* R3, Tab 67, Ex. 2.

[34]*See* Tr. of June 30, 1998 Hr'g at 16, *in* R11 ("[O]ne of the Christo children] made mention that there was a deal between Mr. Christo and Mr. Padgett for Mr. Padgett to go and bid on behalf of Mr. Christo."); 21

Phillip Christo testified that Padgett had agreed to buy Bay Bank on his behalf, he admitted that he relied on his father's word for that opinion.[35] Moreover, throughout his testimony, Phillip Christo refers to the agreement as Padgett and Christo, Jr.'s.[36] Third, Irene Christo admitted that she had never discussed the agreement with Padgett even though she had successfully sought reimbursement from Padgett for her portion of the $250,000 auction payment.[37] And although Irene Christo testified "I just know in my heart for him [sic] to get the bank at 8.5 million and for the deal that he had with my father to assign the stock over, that he didn't fulfill his part of the bargain," she conceded that she never made a demand against Padgett.[38] Finally, Padgett testified that he had never had any discussion with the Christo children regarding an agreement to purchase Bay Bank on their behalf.[39]

Reviewing this record, there is simply no evidence that was ever an agreement between Padgett and anyone other than

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("From the testimony we had gotten before we filed suit all evidence pointed if [sic] there was an agreement it was Mr. Christo's agreement with Mr. Padgett . . . .").

[35]*See id.* at 138-39, 140.

[36]*See id.* at 160 ("[T]here was an agreement between [Padgett] and dad"); 149 ("I felt like that [sic] Mr. Padgett would honor his agreement with my dad . . . .").

[37]*See id.* at 108-09.

[38]*Id.* at 110.

[39]*See id.* at 79.

Christo, Jr. himself.[40] Even though the Christo children would obviously have benefitted financially from Padgett's sale of Bay Bank to Union Planters, this, without more, does not confer on them the right to pursue a cause of action for breach of contract against Padgett. Because any cause of action would have belonged solely to Christo, Jr., that cause of action became property of the estate when he filed his petition for bankruptcy. *See* 11 U.S.C. § 541(a)(1) (2000); *Meehan v. Wallace (In re Meehan)*, 102 F.3d 1209, 1210 (11th Cir. 1997). Christo, Jr. stood silently by when the Trustee filed suit against Padgett for breach of contract, and then sought to assert the same claims after the Trustee voluntarily dismissed them.[41] This he may not do.

Christo, Jr. nevertheless contends that the district court should not have weighed the evidence when there was an outstanding motion for summary judgment and demand for a

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[40]*See also* note 33, *supra*.

[41]Christo, Jr. emphasizes that Miller, deeming the dismissed claims worthless, abandoned them and that, because the claims had been dismissed without prejudice, that Christo, Jr. was later free to pursue those abandoned claims. At Padgett's request, Miller filed a notice seeking to abandon his earlier dismissed claims against Padgett, *see* Notice of Intent to Abandon Counts III and IV of Lawsuit, *in* R3, Tab 67, Ex. 12, but after Padgett's objection, filed an amended notice in which Miller explained that Christo, Jr. could not pursue the dismissed claims because the dismissal had resolved those claims or because Christo, Jr. was barred by the automatic stay, *see* Trustee's Amendment and Clarification of His Notice of Abandonment Dated January 15, 1998, at 4-5, *in* R3, Tab 67, Ex. 13.

jury trial in the Christo litigation. The district court made the contested factual findings in the Miller litigation, however, litigation in which the Christos never attempted to intervene. The judge ordered a hearing on the issues underlying both the Miller and Christo litigations and invited all interested parties to present evidence.[42] The district court's factual findings, made in the Miller litigation, were not clearly erroneous. In any event, summary judgment would have been appropriate on the Christos' claims in light of the dearth of evidence that anyone other than Christo, Jr. would have had a viable claim against Padgett.

D. Motion to Dismiss

In its July 13, 1998, order, the district court made preliminary findings that no agreement existed between Christo, Jr. and Padgett regarding the purchase of Bay Bank and that, even if such an agreement had existed, Christo, Jr. acted solely on his own behalf and therefore any claim of his against Padgett became the property of his bankruptcy estate.[43] Based on these findings, the district court later dismissed the Christos' breach of contract suit against Padgett on the grounds of issue preclusion. In the alternative, the court determined that summary judgment would be appropriate.

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[42]*See* Order, June 15, 1998, at 2, *in* R7, Tab 11.

[43]*See* Order, July 13, 1998, at 3-4, *in* R7, Tab 14.

The Christos argue that the July 13 order cannot have preclusive effect because it was not a final judgment. Technically, the Christos' assessment of the July 13 order is correct. The order's introductory paragraph reads in part, "[t]he Court now makes *preliminary* findings on issues which are conditions to the proposed settlement . . . ."[44] The Christos, emphasizing the need for finality, contend a judgment is final only when appealable under 28 U.S.C. § 1291. The only cases cited by the Christos defining the finality requirement for preclusion, however, involve *claim* preclusion. *See In re Justice Oaks II, Ltd.*, 898 F.2d at 1549-50; *First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc.*, 825 F.2d 1475, 1481 (11th Cir. 1987).[45] This case, by contrast, involves issue preclusion; the court stated that all the facts and questions essential for the Christos' breach of contract claims were decided in the July 13 Order.[46]

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[44]Order, July 13, 1998, at 1, *in* R7, Tab 14 (emphasis added).

[45]The *First Alabama Bank* court's observation that "[n]onappealable final orders are not entitled to collateral estoppel or res judicata effect," see 825 F.2d at 1481 n.5, is dicta because the decision involved only claim preclusion. *See also Gresham Park Comm. Org. v. Howell*, 652 F.2d 1227, 1243 (5th Cir. Unit B 1981) (applying *Lummus* standard of relaxed finality for issue versus claim preclusion), *overruled on other grounds*, *Wood v. Orange County*, 715 F.2d 1543, 1546 (11th Cir. 1983).

[46]The *In re Justice Oaks II* court summarized these concepts succinctly:

> Res judicata is frequently used to refer generically to the law of former adjudication. . . . If the later litigation arises from the same cause of action, then the judgment bars litigation not only

It is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion. *See Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961); Restatement (Second) Judgments § 13 (1980); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4434 at 321 (1981 & Supp. 2000).[47] The July 13 order satisfied this limited standard for finality. The court considered a wide range of evidence from all concerned parties and wrote a substantial order in which it explained its findings. Moreover, the court put the parties on notice that the order could have preclusive

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> of every matter which was actually offered and received to sustain the demand, but also of every claim which might have been presented. In this opinion, we refer to this strand of former adjudication as "claim preclusion." If, however, the subsequent litigation arises from a different cause of action, the prior judgment bars litigation only of those matters or issues common to both actions which were either expressly or by necessary implication adjudicated in the first. We refer to this strand of former adjudication as "issue preclusion."

898 F.2d at 1549-50 n.3 (internal quotation marks and citations omitted).

[47] "The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) Judgments § 13. Comment g adds criteria for determining whether a decision was "adequately deliberated and firm" or "avowedly tentative," including whether the parties were fully heard.

effect,[48] and it is clear that both the district and bankruptcy courts considered those findings final. Even if the Christos were technically correct that the July 13 order has no preclusive effect, their argument is ultimately one of form rather than substance. Three weeks after dismissing the Christos' lawsuit, the district court entered a final order approving the proposed settlement in the Miller litigation.

In the alternative, the Christos claim that even the final order approving the settlement has no preclusive effect. The Christos cite *In re Justice Oaks II*, 898 F.2d at 1549 for this proposition. *In re Justice Oaks II*, however, stands for the simple proposition that a bankruptcy court's assessment of the claims underlying a proposed settlement do not constitute a final judgment on the merits of those claims. *See id.* ("[A] bankruptcy court's order authorizing settlement of a claim cannot constitute a final judgment on the merits for purposes of former adjudication."). Here, in contrast, the district court made factual findings, after hearing extensive evidence, that were binding on the bankruptcy court's consideration whether the approve the proposed settlement.

This court has articulated the following standard for issue preclusion:

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[48]*See* Order, June 15, 1998, at 2, *in* R7, Tab 11 (ordering June 30,1998 hearing and making clear that "this proceeding could result in an order granting the motion to approve settlement, and, ultimately, preclusion of any parties from pursuing claims against Kenneth Earl Padgett regarding his purchase of Bay Bank and Trust Company and/or his failure to assign any interests therein.").

> To claim the benefit of collateral estoppel the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998). In determining when an issue has been "actually litigated," the *Pleming* court cited with approval the Restatement's formulation that "[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." *Id.* (quoting Restatement (Second) of Judgments § 27 cmt. d (1982)).

In this case, all of the elements for issue preclusion have been satisfied: (1) the issues decided after the June 30, 1998, hearing were identical to those asserted in the Christo litigation; (2) those issues were actually litigated on June 30, 1998; (3) determination of those issues was essential to the court's judgment in the Miller litigation; (4) and the Christos had a full and fair opportunity to present their evidence on the issues. *See Pleming*, 142 F.3d at 1359. The district court correctly dismissed the Christos' claims on the ground of

issue preclusion.[49] In the alternative, the district court properly granted summary judgment to Padgett based on the lack of evidence of an agreement between Padgett and any of the Christo children.

III. CONCLUSION

We lack jurisdiction to review the district court's decision not to remand the Christo litigation to the state court whence it came; we AFFIRM the district court in denying the motion to recuse, in approving the proposed settlement in the Miller litigation, and in dismissing the claims in the Christo litigation on the ground of issue preclusion.

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[49]The Christos' argument that a finding of issue preclusion denied them the right to have a jury hear their claims against Padgett is unavailing. "The determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to a jury in that subsequent action if collateral estoppel did not apply." Restatement (Second) Judgments § 27 cmt. d (1982).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

In re:

JOHN CHRISTO, JR.

Case No. 5:98cv38/LAC
(Bankruptcy Case No. 94-2031)

_____/

ORDER

Before the Court is the motion to approve settlement of controversy filed by Kenneth Earl Padgett. (doc. 9). As more fully stated below, the Court now makes preliminary findings on issues which are conditions to the proposed settlement and refers this matter to the Honorable Lewis M. Killian, Jr., United States Bankruptcy Judge, for a report and recommendation.

I. Background

On January 15, 1998, in the underlying bankruptcy case,[1] the trustee for the bankruptcy estate of John Christo, Jr. filed a notice of intent to abandon the following property of the estate: counts III and IV of the case styled WILLIAM J. MILLER, JR. as Trustee for the Estate of JOHN CHRISTO, JR. v. KENNETH EARL PADGETT, Case No. 5:96cv173/LAC. (doc. 1)[2]. In counts III and IV of that action, the trustee alleged that in September of 1993 Padgett and Christo Jr. entered an agreement whereby Padgett would bid at the foreclosure sale of Bay Bank & Trust Company ("Bay Bank") on September 30, 1993 and whereby Padgett would assign the bank or his rights to buy the bank to Christo Jr. or his designee in the event Padgett became the successful bidder. Padgett allegedly failed to assign his rights to the bank after becoming the successful bidder at the foreclosure sale. The trustee sought a turnover of Bay Bank or, in the alternative, monetary relief. The trustee later voluntarily dismissed these claims on the basis that the cost of pursuing them would likely outweigh any recovery for the estate.

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[1]On February 16, 1994, Christo Jr. filed for bankruptcy under chapter 7 of the United States Bankruptcy Code.

[2]The first docket entry in the file for this case is a composite of documents filed in the underlying bankruptcy case. For ease of reference, the Court will cite only to the docket entry numbers assigned to the documents in this case.

In his notice of abandonment, the trustee indicated that the claims can be abandoned because they are of inconsequential value. (doc. 1). In his objection to the abandonment, Padgett asserts that if the claims are truly of inconsequential value, the trustee should be subject to sanctions for earlier pursuing said claims against Padgett and causing Padgett to defend them at great expense. (doc. 1). Subsequent to the filing of Padgett's objection, the trustee agreed upon a proposed settlement with Padgett, and the motion for this Court's approval of the settlement followed. (doc. 9).

Christo Jr. and several other parties (hereinafter collectively referred to as the "Christo Group") oppose the proposed settlement and support the trustee's abandonment of counts III and IV in Case No. 5:96cv173. The Christo Group claims that Christo Jr. acted as the Christo Group's agent when he entered the agreement with Padgett and that each Group member has an independent right to enforce the agreement. The Christo Group also contends that there is substantial value to these claims.

II. Discussion

One condition of the settlement is this Court's entry of an order finding that the trustee owns any and all claims against Padgett relating to Padgett's acquisition of Bay Bank or any pre-bankruptcy agreement between Padgett and Christo Jr. Such an order would essentially confirm the trustee's authority to settle said claims, assuming the terms of the

settlement are otherwise proper. If the claims are settled under those circumstances, the Christo Group could also be precluded from pursuing them in any action.

On June 15, 1998, this Court issued an order advising interested parties that an evidentiary hearing on the motion to approve the settlement would be held on June 30, 1998. (doc. 11). Interested parties, including each member of the Christo Group, were expressly notified that the Court would hear evidence on "the identity of any and all parties who had any enforceable agreement with Kenneth Earl Padgett regarding the September 30, 1993 foreclosure sale of Bay Bank and Trust Company and/or any subsequent assignment of said company, or any interest therein, by Kenneth Earl Padgett." (doc. 11). The Court further informed the parties that the [sic] "this proceeding could result in an order granting the motion to approve settlement, and, ultimately, preclusion of any parties from pursuing claims against Kenneth Earl Padgett regarding his purchase of Bay Bank and Trust Company and/or his failure to assign any interest therein." (doc.9).

At the commencement of the hearing on June 30, the Court granted Padgett's motion to withdraw the reference. (doc. 12). The hearing lasted a full day, and the Court heard sworn testimony and received documentary evidence on behalf of the trustee, Padgett, and the Christo Group. (doc. 13).

Based on all the evidence presented at the hearing, the Court now finds that there was no enforceable agreement between Padgett and Christo Jr. or between Padgett and any other member of the Christo Group regarding the sale of Bay

Bank or an assignment of Padgett's rights to the bank. The Christo Group presented evidence to the contrary, but the Court concludes that such evidence is not credible and deserves no weight. However, even if this Court were to credit such evidence, the only agreement presented by the Christo Group was one exclusively between Padgett and Christo Jr. It was undisputed that no one other than Christo Jr. negotiated with Padgett about any agreement to bid on the bank or assign it thereafter. Furthermore, the Christo Group's evidence showed that Christo Jr. was acting entirely on his own behalf when he purportedly entered the agreement with Padgett. That is not to say that other members of the Christo Group would not have eventually benefitted indirectly from such an agreement. However, the Court finds that even if there was an agreement between Padgett and Christo Jr., it was not structured to directly benefit any other member of the Christo Group, and Padgett could not have known or intended that such benefits would result from the agreement.

Consequently, it is the determination of this Court that neither Christo Jr. nor any other member of the Christo Group has any claim against Padgett based on any agreement regarding the September 30, 1993 sale of Bay Bank or the assignment of Padgett's rights in Bay Bank. Moreover, the Court concludes that even if there were such an agreement, any claims against Padgett arising out of the agreement would belong entirely to the trustee for the bankruptcy estate of Christo Jr.

Pursuant to 28 U.S.C. § 157, the Court will now refer Padgett's motion to approve the settlement to the Honorable

Lewis M. Killian, Jr., United States Bankruptcy Judge, for a report and recommendation on whether the motion should be granted in light of the findings herein. Upon review of Judge Killian's report and recommendation, this Court will enter a final order on the motion.

III. Conclusion

Accordingly it is hereby ordered:

1. Kenneth Earl Padgett's motion to approve the settlement (doc. 9) is hereby referred to the Honorable Lewis M. Killian, Jr., United States Bankruptcy Judge, for a report and recommendation on whether the motion should be granted in light of the findings herein.
2. The Clerk shall transmit to Judge Killian certified copies of all documents filed in this case after the Bankruptcy Transmittal Sheet (doc. 1), including this order.

ORDERED on this 13th day of July 1998.

s/ _____
Lacey A. Collier
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

JOHN CHRISTO, JR., et al.,

Plaintiffs,

v. Case No. 5:97-cv-320/LAC

KENNETH EARL PADGETT,

Defendant.

_____/

ORDER

Before the Court is Plaintiffs' motion to remand and documents in support thereof. (docs. 25; 26). Defendant has responded. (docs. 38; 39). Also pending before the Court is Defendant's motion to dismiss. (docs. 12; 13). Plaintiffs have responded. (doc. 36). For the reasons expressed in the order, Plaintiffs' motion is **DENIED** and Defendant's motion is **GRANTED.**

I. STATEMENT OF THE CASE

A. Background

In order to understand the genesis of the Plaintiffs' Complaint, one must trudge down a long and winding road. Bay Bank & Trust ("BB&T") was wholly owned by a holding company, Florida Bay Banks, Inc. ("FBB"), and Plaintiffs were the majority owners of FBB. FBB defaulted on loans from SouthTrust Bank of Alabama, N.A. ("SouthTrust") which were secured by all of the issued shares of stock in BB&T. The amount of principal and interest on said loans was $4,883,593.15. SouthTrust was in a position to force a sale of the BB&T stock in order to satisfy its security interest and it took steps to do so.

In 1993, the principal Plaintiffs in this action, John Christo, Jr. and John Christo, III, invoked the jurisdiction of this Court to resolve issues related to the BB&T sale. Case No. 93-50027-LAC. Jurisdiction in that action was premised, *inter alia*, upon 28 U.S.C. § 1343 (providing district courts original jurisdiction over civil rights violations) and 42 U.S.C. § 1983 (providing that every person acting under color of state law shall be liable in an action at law or equity for deprivations of rights, privileges, or immunities secured by the Constitution and laws). The Defendants in that action included SouthTrust, which, at the time, still claimed a security interest in all of the issued and outstanding stock of

BB&T[3]. SouthTrust filed a counterclaim against the Christos and FBB[4] alleging substantial defaults in the loans secured by Bay Bank stock and seeking (a) *in rem* relief to foreclose upon its security interest in the stock of BB&T and (b) *in personam* relief in the form of money judgments against FBB and John Christo, Jr., who were guarantees on various SouthTrust loans.

This Court subsequently entered an order approving and incorporating the terms of an agreement between the Christos and SouthTrust and scheduling a foreclosure sale of the BB&T stock. SouthTrust was to conduct this sale with the express provision that the successful bidder would have to obtain approval of federal and state banking authorities in order to acquire ownership and control of Bay Bank[5]. This Court retained jurisdiction in its sale order to enforce the terms and conditions of that agreement.

On September 30, 1993 following this Court's direction in the sale order, the auction of BB&T stock was conducted.

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[3]Bay Bank was and is a federally regulated bank.

[4]At the time, Florida Bay Banks, Inc. and BBT were still controlled by the Plaintiffs in this case.

[5]The Change in Bank Control Act, 12 U.S.C. § 1817, and its implementing regulations, 12 C.F.R. § 303.4, required that certain conditions be met, including listing the names of those seeking to control the bank. This Court's order provided the mechanics and procedures for the sale of the BB&T stock and a subsequent order ratified and confmed the sale to Padgett based on the finding that the Christos were not involved in the purchase of the stock. In other words, finding that Padgett was not acting as an agent.

Prior to the auction, John Christo, Jr. was searching feverishly to find a buyer for BB&T. It is undisputed that the BB&T stock was more than adequate security for the debt to SouthTrust. FBB was poised to "lose it all"—especially if SouthTrust was able to acquire BB&T simply by bidding in the value of its loan. On the evening of September 29, 1993, when Christo, Jr. realized that a prospective buyer, Union Planters Corporation, would not be able to purchase BB&T in time, he pleaded with Padgett for assistance. Based on his previous experience as a director of BB&T and personal knowledge of the bank's assets, Padgett was convinced that BB&T's value was much greater than the amount secured by FBB's defaulted loans. The Christos desperately needed a competitor to bid on BB&T in order to prevent SouthTrust from taking BB&T for less than its full value. The Christos faced a ruinous loss and Padgett was their only hope.

In response to Christo, Jr.'s pleas, Padgett agreed to participate and become a bidder in the September 30, 1993 auction of BB&T stock. At the auction, SouthTrust made the opening bid in the amount of FBB's debt. There were other active bidders in addition to SouthTrust and Defendant, but none of them bid after the price rose above $5,750,000. Beyond that point, only SouthTrust and Padgett offered bids. Ultimately, Padgett was the successful bidder with a final bid of $8,500,000.

By the time Padgett closed on the sale of the BB&T stock, Christo, Jr., had filed for bankruptcy. With the proceeds of the sale, SouthTrust received payment on FBB's defaulted loans in satisfaction of the debt. The excess

proceeds, over $3,000,000, went to FBB. Exercising control over Christo, Jr.'s majority ownership of FBB, the bankruptcy trustee gained possession of more than 50% of the excess proceeds. With those proceeds, the bankruptcy trustee paid SouthTrust over $1,000,000 to satisfy other loans for which Christo was personally responsible. In other words, Padgett's participation in the bidding process netted the Christos $3,000,000 more than they would have received if SouthTrust's bid had gone unopposed. Christo, Jr.'s success in persuading Padgett to bid on BB&T was productive.

After the sale, SouthTrust filed a motion in Case No. 93-50027-LAC seeking to set aside the sale to Padgett on the ground that Padgett was acting as the Christos' "strawman."[6] SouthTrust also sought sanctions against John Christo, Jr., John Christos, III, Philip Christo, and all other Bay Bank directors.

Padgett immediately filed a motion to intervene which he served on all of the Christos and their attorney in this case. In those pleadings, Padgett, under oath, categorically and emphatically denied that he was then, had ever been, and would ever be in the future an associate of any member of the Christo family in the Bay Bank venture. Following a hearing attended by the Chistos [sic] and their counsel, this Court

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[6]During the auction, counsel for SouthTrust expressed their concern and warned Padgett that if he was fronting for the Christos, he would be in violation of the laws of the Federal and State Banking Regulatory Systems, as well as conducting a fraud upon the Northern District Court of Florida since the foreclosure was being conducted in conjunction with an approved court order. (doc. 38:3).

stated that it would take the issues under advisement and "would consider the future actions of all parties engaged in this lawsuit" prior to making a final determination regarding the intent and purposes of the parties. Neither the Christos nor their attorney disputed Padgett's claim that he was then, had ever been, or would ever be an associate of any member of the Christo family. Nor did they challenge Padgett's categorical statement, made under oath, that the Christos would not have any interest in Bay Bank. Additionally, the principal parties and the attorney in this case signed this Court's earlier order scheduling the sale of BB&T and providing for this Court to retain jurisdiction. At no time, in spite of numerous opportunities, did the Christos claim to have a "deal" with Padgett or deny Padgett's assertions to the contrary.

Subsequently, two additional actions were filed with this Court specifically dealing with the sale of BB&T stock to Padgett. The first of these suits was a suit by Padgett against SouthTrust seeking injunctive and other relief because SouthTrust was attempting to terminate Padgett's contractual right to acquire the stock of BB&T. In connection with that proceeding, this Court denied SouthTrust's motion to dismiss the complaint based on a lack of personal jurisdiction. This Court found it had personal jurisdiction over the parties and *in rem* jurisdiction over the 495,000 shares of BB&T stock which was sold pursuant to this Court's order. *See* Order Granting Preliminary Injunction dated Jan. 14, 1994:2 (Case No. 95-50318-LAC).

On February 16, 1994, Christo, Jr., again invoked the jurisdiction of this Court by personally filing a Voluntary Petition under Chapter 7 of the Bankruptcy Code. Christo, Jr.'s commencement of Chapter 7 proceedings created an "estate" comprised of all of Christo Jr.'s property, including any causes of action related to the "deal" alleged in this case, although no claim was listed with the bankruptcy trustee.

B. Procedural History

Subsequently, over four years after this Court issued its order governing the terms and conditions of the sale of BB&T stock, and four years after Padgett testified he had no relationship with the Christos, the Plaintiffs filed this suit in state court, alleging, *inter alia*, that Padgett's testimony was perjury. The Complaint seeks ownership of the stock of Bay Bank & Trust in Count III. Padgett removed this case based on federal question jurisdiction, alleging jurisdiction under this Court's supplemental jurisdiction, the All Writs Act, ERISA, and Federal Banking Law. (doc. 1). [The] Christos seek to remand based on a lack of subject matter jurisdiction. Padgett seeks to dismiss the claim based on a settlement agreement reached in Christo, Jr.'s bankruptcy case.

II. MOTION TO REMAND

Because the Court finds that ownership of Bay Bank & Trust is the only issue present in the Christos' Complaint, jurisdiction must reside in this Court. The following

discussion details why this Court finds original jurisdiction (and thus supplemental jurisdiction over Plaintiffs' state law claims) and jurisdiction under the All Writs Act. The Court is not persuaded by Defendant's claim of jurisdiction under ERISA and will not discuss this issue. Defendant also argues that Federal Banking Law prevents the Christos from entering the agreement alleged in this Complaint because they are convicted criminals and because the Federal Deposit and Insurance Corporation ("FDIC") has not given permission for them to be affiliated with BB&T. In other words, the very contract alleged in this Complaint is illegal under federal law. While agreeing with the logic of Defendant's argument, the fact that a contract is void or voidable is an affirmative defense, which generally cannot provide a basis for removal. *Rivet v. Regions Bank of Louisiana*, 118 S.Ct. 921, 926, 139 L.Ed.2d 912 (1998). Therefore, the Court will not address this issue.

A. Supplemental Jurisdiction

Padgett's first basis asserted for removal jurisdiction is 28 U.S.C. § 1367(a) ("supplemental jurisdiction") which provides, in part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same

case or controversy under Article III of the United States Constitution.

Plaintiffs argue that Padgett can not invoke this Court's supplemental jurisdiction because it does not already have original jurisdiction over the claims asserted, which are basically state law claims. In reading this statute, Plaintiffs have failed to properly interpret the matter before this Court. The question is not whether there is original jurisdiction over the Plaintiffs' state law claims, the question is whether the Plaintiffs' state law claims are so related to another matter within this Court's original jurisdiction to justify taking supplemental jurisdiction over the state law claims.

Defendants generally may remove "any civil action brought in a State court of which the [federal] district courts . . . have original jurisdiction." 28 U.S.C. [§] 1441(a). The district courts' original jurisdiction encompasses cases "arising under the Constitution, laws, or treaties of the United States," § 1331, and an action satisfies this requirement when the plaintiff's well-pleaded complaint raises issues of federal law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987).

The presence of federal question jurisdiction is ordinarily determined by the "well-pleaded complaint" rule, which provides that the federal question must be "presented on the face of the plaintiff's properly pleaded complaint" to confer jurisdiction. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, "the plaintiff is the master of the complaint and may avoid federal jurisdiction by relying exclusively on state law." *Childers v.*

Chesapeake & Potomac Tel. Co., 881 F.2d 1259, 1261 (4th Cir. 1989).

Most importantly, it is "settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint...." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430; *Pacheco De Perez v. AT&T Company*, 139 F.3d 1368, 1373 (11th Cir. 1998). The well pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392, 107 S. Ct. at 2429. In other words, by artfully pleading his or her case, a plaintiff may avoid federal jurisdiction.

Nevertheless, the Supreme Court has developed an "independent corollary" to the well pleaded complaint rule which recognizes that "Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

This independent corollary, known as [the] "complete preemption" doctrine, acknowledges that there may exist *some circumstances* where federal law creates a federal remedy for some wrong and displaces all state law remedies regardless of what law the plaintiff relies upon in the complaint. Because the Supreme Court has only invoked the doctrine in "extraordinary" cases, this Court must construe it narrowly. *See Caterpillar, supra*, at 393, 107 S.Ct. at 2430.

In the Eleventh Circuit, a court may not accept federal question jurisdiction even if there is a federal issue where the federal issue is "collateral" to the essence of the Plaintiff's state law claims. *Pacheco De Perez*, 139 F.3d at 1376. A state law action should not become "federalized" simply because a federal issue is collateral to the essence of the state law claims. *Id.*

In *Pacheco de Perez*, the Eleventh Circuit was considering the Privileges and Immunities Clause of the Constitution, which requires each state to provide access to its courts "to citizens of all other states to the precise extent that it is allowed to its own citizens." 139 F.3d at 1376. The *Pacheco de Perez* Court determined that a Georgia statute specifically granting this right could not be construed to "federalize" all actions brought by non-citizens. *Id.* In other words, the fact that a court must look to federal law in order to construe a state law is insufficient, standing alone, to confer federal question jurisdiction. In setting this line between collateral and basic federal issues, the Eleventh Circuit pointed out that the "federal nature of the right to be established is decisive—not the source of the authority to establish it." *Id.* at 1375.

The foregoing articulations of complete preemption and the artful pleading doctrine are helpful, but they do not draw a bright line to tell this Court how certain it must be that an artfully pleaded complaint contains a non-collateral federal question completely preempting state law claims before denying a motion to remand. Nonetheless, this Court concludes that the artful pleading doctrine permits it to find a

federal claim when a review of the Complaint, *taken in context*, reveals a colorable federal question which preempts Plaintiff's state law claims. As a matter of common practice, when confronted with a question of subject matter jurisdiction this Court reviews a plaintiff's complaint not to judge the merits, but to determine whether the Court has the authority to proceed. When conducting this inquiry, the Court only asks whether the complaint, on its face, asserts a colorable federal claim. *See Aldinger v. Howard*, 427 U.S. 1, 7, 96 S.Ct. 2413, 2417, 49 L.Ed.2d 276 (1976). While the mere presence of a federal question does not automatically confer federal-question jurisdiction, if there is a "substantial question of federal law in dispute between the parties" then jurisdiction may be proper. *Diaz v. Shepard*, 85 F.3d 1502, 1505 (11th Cir. 1996).

Here, Plaintiffs allege that Padgett acted as their agent in acquiring the stock of Bay Bank & Trust and occupied a fiduciary position with respect to them (Count I) and fraudulently abused that fiduciary position (Count II). They further allege that, since they were in fact the beneficial owners of Padgett's purchase agreement with Florida Bay Banks, Inc. and of the Bay Bank & Trust stock, Padgett has converted their stock by refusing to give it to them (Count III), and that Padgett committed "promissory fraud" by refusing to assign the BB&T stock to them (Count IV).

In analyzing these counts, the Court does not need to look to federal law as a source of authority to establish the Plaintiffs' state law claims. Nor does this case call on the Court to look to federal law in order to construe a state law

claim. In this case, when the probing eye of judicial notice gazes upon [the] Christos' pleading, the colorable federal issues become perfectly clear. It is clear that Plaintiffs' [sic] are seeking to establish a right to the stock of Bay Bank & Trust. This Court retains *in rem* jurisdiction to determine property rights in the stock of BB&T. Ownership of the bank's stock is not "collateral" to the Plaintiffs' state law claims. Indeed this is an issue within the exclusive jurisdiction of this Court.

Ultimately, it would be the Christos' own wrongdoing in concealing information about their alleged deal with Padgett in prior cases before this Court which causes them harm. Their translucent attempt to cobble together a state law claim designed to defeat federal jurisdiction fails miserably given the facts and circumstances of this case.

The sale and ownership of BB&T stock was governed by federal banking law. *See* 12 U.S.C. §§ 1811, *et seq*. In addition to original jurisdiction under federal banking laws, this Court has *exclusive* jurisdiction over the pending bankruptcy case of *In re Christo, Jr.*[7] in which ownership of the BB&T stock is in dispute. 28 U.S.C. § 1334. Each of the Plaintiffs' claims is inextricably enmeshed in the sale of BB&T stock conducted on 30 September, 1993. By basing their Complaint on the sale and ownership of BB&T stock and challenging this Court's disposition of the stock, Plaintiffs are

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[7]Case No. 5:98-cv-38/LAC (Bankruptcy Case No. 94-2031). *See* discussion *infra* Part III.

pleading a question within the original and exclusive jurisdiction of this Court.

When, as here, a "well-pleaded complaint establishes that [the] right to relief under state law requires resolution of a substantial question of federal law between the parties" then federal jurisdiction can be found to exist. *Diaz v. Shepard*, 85 F.3d 1502, 1505 (11th Cir. 1996). Clearly this Court has and continues to have *in rem* and original jurisdiction over the terms and conditions of the sale of and ownership of BB&T stock. By seeking ownership of this stock in their Complaint, the Plaintiffs necessarily invoke this Court's jurisdiction.

Having found original and exclusive jurisdiction, this Court finds it must accept supplemental jurisdiction over Plaintiffs' pendant state law claims. The Christos' claims are an integral part of matters and controversies within this Court's original jurisdiction, invoked in numerous other proceedings involving the Plaintiffs[8]. *See* discussion *infra* Part III.

B. All Writs Act

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[8]*See* 1) *Bay Bank & Trust Co., Florida Bay Banks, Inc., John Christo, Jr., and John Christo, III v. Department of Banking & Finance of the State of Florida, SouthTrust Bank of Alabama, N.A., et al., v. Kenneth Earl Padgett*, Case No. 93-50027-LAC; 2) *Kenneth Earl Padgett v. SouthTrust Bank of Alabama, N.A.*, Case No. 93-50318-LAC; 3) *William J. Miller, Jr., as trustee for the Estate of John Christo, Jr. v. Kenneth Earl Padgett*, Case No. 5:96-cv-173-LAC; and 4) *In re: John Christo, Jr.*, Case No. 5:98-cv-038/LAC (Bankruptcy Case No. 94-2031).

The *Pacheco de Perez* Court, *supra* also considered the circumstances where it might be proper for a court to use its power under the All Writs Act[9] to grant removal. 139 F.3d at 1379. Although it is not appropriate for a court to grant jurisdiction merely to determine the preclusive effect of a prior final judgment, under certain circumstances, a court may assume removal jurisdiction under the Act in order to "enforce ongoing orders against relitigation and to guard the integrity of its prior rulings over which it has expressly retained jurisdiction." *Id.* at 1379-80.

In this case, the extensive history, proceedings, hearings, and orders of this Court, combined with ongoing bankruptcy litigation turning on the disposition of BB&T stock, present just such an exceptional circumstance. This Court has issued numerous orders governing the sale and disposition of the BB&T stock. Under the unique facts and circumstances of this case, the Court finds it necessary to accept jurisdiction under the All Writs Act in order to protect the integrity of prior rulings on the ownership of BB&T stock and prevent relitigation of issues related to the ownership of Bay Bank & Trust.

III. MOTION TO DISMISS

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[9]25 U.S.C. § 1651(a) provides that "[t]he Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions."

"The broad 'res judicata' phrase refers to the distinctive effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.'" WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE, Res Judicata § 4402 (1981). "The distinction between an issue and a claim is often one of degree and emphasis in applying a deeper principle that an original misadventure cannot be retrieved for a second chance." *Id.* Res judicata "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Id. § 4403 (quoting *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). "The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes." WRIGHT, MILLER, & COOPER, § 4403. "As to actions pending at the same time, res judicata attaches the first judgment regardless of the sequence in which the actions were commenced." *Id.* § 4404. Issue preclusion bars relitigation of a previously decided issue "when the parties are the same (or in privity) if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding." *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir. 1995).

In *In re: John Christo, Jr.*, Case No. 5:98-cv-38/LAC (Bankruptcy Case No. 94-2031), this Court invited interested parties, including each of the Plaintiffs in this case, to present evidence on "the identity of any and all parties who had any enforceable agreement with Kenneth Earl Padgett regarding

the September 30, 1993 foreclosure sale of Bay Bank and Trust Company and/or any subsequent assignment of said company, or any interest therein, by Kenneth Earl Padgett." The Court further informed the parties that "this proceeding could result in an order granting the motion to approve settlement, and, ultimately, preclusion of any parties from pursuing claims against Kenneth Earl Padgett regarding his purchase of Bay Bank and Trust Company and/or his failure to assign any interest therein." Thus Plaintiffs had ample notice and due process to challenge this Court's intent to rule on any claimed property rights in BB&T's stock or stemming from the sale thereof.

Indeed, the Plaintiffs in this case accepted the Court's invitation and presented evidence to support the existence of a clandestine agreement with Padgett. However, the Court concluded that their evidence was not credible and deserved no weight. The Court's order went on to say that even if this Court had credited the evidence, the only agreement presented by the Plaintiffs was one exclusively between Padgett and Christo, Jr. The Plaintiffs never disputed that any one other than Christo, Jr. negotiated with Padgett about any agreement to bid on the bank or assign it thereafter. Furthermore, the Plaintiffs' evidence showed that Christo, Jr. was acting entirely on his own behalf when he purportedly entered the agreement with Padgett. The Court found that even if there was an agreement between Padgett and Christo, Jr., it was not structured to *directly* benefit any other member of the Christo Group, and Padgett could not have known or intended that such benefits would result from the agreement.

This Court issued an order making the following finding:

> [I]t is the determination of this Court that neither Christo, Jr. nor any other member of the Christo Group has any claim against Padgett based on any agreement regarding the September 30, 1993 sale of Bay Bank or the assignment of Padgett's rights in Bay Bank. Moreover, the Court concludes that even if there were such an agreement, any claims against Padgett arising out of the agreement would belong entirely to the trustee for the bankruptcy estate of Christo Jr.

There are no issues present in this case which were not litigated in *In re: John Christo, Jr.* Each of the Plaintiffs had full and fair opportunity to present evidence and argue claims related to the sale of BB&T stock. Whether Plaintiffs' Complaint is dismissed because the issues have already been litigated, or summary judgment is granted based on a review of the same facts and law already considered by this Court, the end result is the same. This Court's finding, in the above referenced case, puts an end to the Plaintiffs' claim. *See Rivet v. Regions Bank of Louisiana*, 118 S.Ct. 921, 925, 139 L.Ed.2d 912 (1998). This Complaint was born in numerous actions, some of which are still ongoing, before this Court. It is proper that this Complaint expires in the same place.

IV. SUMMARY

Accordingly, it is hereby **ORDERED**:

1. Plaintiffs' motion to remand (doc. 25) is **DENIED**.

2. Defendant's motion to dismiss (doc. 74) is **GRANTED**.

3. This action is **DISMISSED** with prejudice.

ORDERED on this 30th day of Sept. 1998.

s/ _____
Lacey A. Collier
United States District Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

IN RE:	*	
	*	
JOHN CRISTO, JR.	*	
	*	Case No. 5:98cv38/LAC
Debtor(s)	*	(Bankruptcy Case No. 94-02031)
	*	

NOTICE OF FILING OF REPORT AND RECOMMENDATION

The undersigned hereby gives notice to all interested parties of the filing of a Report and Recommendation to the Honorable Lacey A. Collier, United States District Judge pursuant to that order entered July 14, 1998, referring the matter of the Settlement Agreement between Kenneth Earl Padgett, and William J. Miller as trustee for the estate of John Cristo, Jr.

DATED at Tallahassee, Florida this 7th day of October 1998.

s/ _____
LEWIS M. KILLIAN, JR.
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

IN RE:	*	
	*	
JOHN CRISTO, JR.	*	
	*	Case No. 5:98cv38/LAC
Debtor(s)	*	(Bankruptcy Case No. 94-02031)
	*	

REPORT AND RECOMMENDATION OF APPROVAL OF SETTLEMENT AGREEMENT BETWEEN KENNETH EARL PADGETT & WILLIAM J. MILLER, as TRUSTEE FOR THE ESTATE OFJOHN CRISTO, JR.

Before this Court is a matter referred by the Honorable Lacey A. Collier, United States District Judge, for a report and recommendation in an order entered July 14, 1998. The matter concerns a proposed settlement agreement reached between Kenneth Earl Padgett and William J. Miller, as Trustee for the Estate of John Cristo, Jr. This report and recommendation addresses whether such settlement agreement should be approved in light of the findings made in the July 14, 1998 Order (doc. 14). Due to the previously held evidentiary hearing and the findings of fact contained in the July 14, 1998 Order and the extensive memoranda filed by the parties, no hearing is necessary in this court. For the below

reasons, I recommend that the proposed settlement agreement be approved as it is in the best interest of the estate.

Background

On February 16, 1994, John Cristo, Jr. filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. A potential asset of the Cristo, Jr. bankruptcy case was a cause of action by Cristo, Jr. against Kenneth Earl Padgett. On January 15, 1998, William J. Miller, as Trustee, filed a notice of his intention to abandon certain property of the bankruptcy estate consisting of a potential cause of action in favor of the trustee against Kenneth Earl Padgett. Specifically, the property was Counts III and IV of the case styled *William J. Miller, Jr.. As Trustee for the Estate of John Cristo, Jr. v. Kenneth Earl Padgett*, Case No. 5:96cv173/LAC. The counts alleged that there was an agreement between Cristo, Jr. and Padgett whereby Padgett would bid at the foreclosure sale of the Florida Bay Banks in order to acquire Bay Bank & Trust Company's stock. If successful at the sale, Padgett would assign the bank or his rights to buy the bank to Cristo or to the Cristo Group (partially comprised of Christo's children). Padgett was the successful bidder at the sale with an 8.5 million dollar bid, and he failed to assign his rights to the bank to Cristo, Jr. or the Cristo Group per the alleged agreement. The trustee sought a turnover of Bay Bank or monetary relief. The Trustee voluntarily dismissed Counts III and IV on the basis that the cost of pursuing them would likely outweigh any recovery to the estate. Padgett and Bay

Bank objected to the Trustee's Notice of Abandonment. The Trustee then filed an amended Trustee's Notice of Abandonment. Following their objection, the Bankruptcy Court granted a Motion to Stay any consideration of the issues raised by the Notice of Abandonment, the Objection to the Notice, and the Amended Notice.

Subsequently, the Trustee, Bay Bank and Padgett entered into a settlement agreement. The settlement agreement provides the following:

- Padgett or Bay Bank will pay from $10,000 to $15,000 to the Trustee;
- The subordination of *over* one million dollars in claims, excluding a claim for $11,231.08, filed by Bay Bank as to all claims filed in the Cristo bankruptcy case except those claims of Cristo family members;
- Padgett will release potential administrative claims against the Trustee for fees, costs, and sanctions based upon the Trustee's earlier prosecution of claims against Padgett based upon the alleged oral contract;
- The Trustee transfers, assigns, and releases any and all claims or causes of action, without limitation, that the Trustee may have against Padgett and/ro [sic] Bay Bank; and
- The Trustee, Padgett, and Bay Bank shall exchange general and mutual releases of all claims.

There are conditions which must be met in order for the agreement to be effective. An order is needed which provides:

- A finding that any cause of action against Padgett belongs to Cristo and does not belong to his children;
- A determination that the Trustee owns any causes of action described within agreement or the subject of any pending litigation;
- That no third party shall pursue the causes of action to be transferred to them or released by the Trustee; and
- Dismissal of pending litigation between Padgett and the Trustee.

Cristo, Jr. and several other parties (the Cristo Group) oppose the proposed settlement agreement and support the Trustee's abandonment of Counts III and IV in Case No. 5:96cv173. The Cristo Group claims that Cristo, Jr. acted as the Group's agent when he entered into the agreement with Padgett and that each Group member has an independent right to enforce the agreement. The Cristo, Jr. and the Cristo Group also claims that there is substantial value to these claims and wants the Trustee to abandon them to Cristo, Jr. Abandonment would allow Cristo, Jr. and the Cristo Group to pursue the claims against Padgett.

Following a hearing on June 30, 1998, an order was entered on July 14, 1998, which held that there was no enforceable agreement between Cristo, Jr. and Padgett or between Padgett and any member of the Cristo Group regarding the purchase of Bay Bank or an assignment of

Padgett's rights. (doc. 14). The Court held that even if there was an agreement regarding the stock of Bay Bank, it was an agreement solely between Cristo, Jr., acting on his own behalf and not as an agent, and Padgett. As such, any claims against Padgett arising out of the agreement belong entirely to the Trustee for the Estate of Cristo, Jr. Consequently, Cristo, Jr. and any member of the Cristo Group have no claims against Padgett based on an agreement regarding the purchase of Bay Bank or the assignment of rights.

Discussion

In reviewing a proposed settlement agreement, a bankruptcy judge is required not to just "rubber stamp" the Trustee's proposal, but rather should use his discretion. American Reserve Corp., 841 F.2d 159, 162 (7th Cir. 1987). In In re Justice Oaks II, Ltd., 898 F.2d 1544, 1549 (11th Cir. 1990), *cert. denied*, 498 U.S. 959 (1990), the Eleventh Circuit stated factors which must be considered in determining whether to approve a proposed settlement agreement. The factors are:

1) The probability of success in litigation;
2) The difficulties to be encountered in the matter of collection;
3) The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

4) The paramount interest of the creditors and a proper deference to the reasonable views in the premises. Id.

The first factor this Court considers is the probability of success in litigation. The July 14, 1998 Order (doc. 14), held that there was not an enforceable agreement between Padgett and Cristo, Jr. or Padgett and the Cristo Group. Even if there was an agreement, it was solely between Padgett and Cristo, Jr. In addition, the Court held that neither Cristo, Jr. nor any member of the Cristo Group has any claim against Padgett regarding the Bay Bank purchase by Padgett. With the finding of no enforceable agreement, the likelihood of success of the Trustee gaining a judgment against Padgett due to the determination that there is an enforceable agreement between Cristo, Jr. and Padgett regarding the purchase of Bay Bank appears slim. If the agreement is not approved, the Trustee may abandon the claims to Cristo. This, however, may not be easy since Padgett and Bay Bank both contest the abandonment, and now argue that due to the proposed settlement agreement, the property has value and cannot be abandoned.

The second factor is the difficulties, if any, to be encountered in the matter of collection. The relief sought by the Trustee when Counts III and IV were originally filed was the Bay Bank stock which Padgett currently owns. This factor is somewhat moot as there would be no difficulty in collection.

The third factor enunciated in **Justice Oaks** is the complexity of litigation involved, and the expense,

inconvenience, and delay necessarily attending it. Currently, there is a stay on proceedings relating to the Trustee's Notice of Abandonment, the Objection of Notice, and the Amended Notice. Other potential lawsuits include those by Padgett against the Trustee. In addition, the Debtor has recently filed a motion to reconsider the July 14, 1998 Order and requests a second evidentiary hearing. Without the settlement, the debtor's estate is obligated to incur expenses associated with these filed and potentially filed actions. Although the debtor claims that Padgett's claims against the estate have no merit, time and expense will be used in getting the cases dismissed or winning at summary judgment. There is also the additional expenses, inconvenience, and delay in litigating whether the Trustee can now abandon the property and Padgett's objection to the abandonment. Therefore, the expense, complexity, inconvenience, and delay that arises from the claims which are addressed and released by the settlement agreement, compel this Court to recommend the approval of this settlement agreement.

Finally, the fourth element to be considered under **Justice Oaks**, is the paramount interest of the creditors. This bankruptcy case was filed in 1994. The creditors have not been paid. By abandoning the claims against Padgett to Cristo, Jr., the estate, and the creditors, receive nothing from these claims. By approving the settlement agreement, the creditors will receive tangible benefits. The settlement agreement provides for a cash payment of $10-15,000 to the Trustee, release of Padgett's asserted administrative claims, and subordination of over one million dollars in claims against

the estate held by Bay Bank. Approval will also eliminate expenses likely to be incurred if the Trustee has to defend any actions brought by Padgett, and those expenses associated with this action and the motion/amended motion to abandon. The biggest benefit to the creditors is that the agreement will permit the distribution of funds, and allow for the bankruptcy estate to be closed. In addition, although previously considered by the Trustee to be of inconsequential value, the estate will now receive $10-15,000 through the agreement. The Debtor states that this amount will mostly pay Trustee fees, and is not a benefit. However, the estate will have to pay the Trustee fees regardless of the settlement agreement being approved.

In reviewing the four factors of **Justice Oaks**, the approval of this settlement agreement satisfies the four factors. If the settlement agreement is not approved, and the Trustee abandons the claims, the estate will obtain nothing on account of the abandonment. With the approval of the agreement, the estate receives tangible benefits.

Recently, the Debtor filed a Supplemental Memorandum of Law in Opposition of the Settlement Agreement. In this motion, the argument is made that the bankruptcy court can not approve a settlement agreement which is illegal. However, the Debtor is confused with the scope of this Court's inquiry. This Court is not approving the settlement agreement between the Trustee, Padgett, and Bay Bank. Rather, this Court has been requested per the July 14, 1998 order to submit a report and recommendation regarding the approval of the agreement.

This Court's determination deals solely with whether the settlement agreement is in the best interest of the estate.

Conclusion

Upon review of the settlement agreement, motions, and orders, filed regarding the proposed settlement, this Court finds that the test under **Justice Oaks** is satisfied. Pursuant to the July 14, 1998 order, this Court recommends that the Kenneth Earl Padgett's motion to approve the settlement agreement be approved as in the best interest of the Debtor's estate.

DATED at Tallahassee, Florida this 7th day of October, 1998.

s/ _____

LEWIS M. KILLIAN, JR.
U. S. Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

PANAMA CITY DIVISION

IN RE:

JOHN CHRISTO, JR.,

Debtor(s)

Case No. 5:98-cv-038/LAC
(Bankruptcy Case No. 94-02031)

_____/

ORDER ADOPTING BANKRUPTCY COURT'S REPORT AND RECOMMENDATION

This matter came before this Court upon Kenneth Earl Padgett's and Bay Bank's (collectively known as "Padgett") motion to approve settlement of controversy. (doc. 9). This Court referred the matter to Lewis M. Killian, Jr., U.S. Bankruptcy Judge, for a report and recommendation. (doc. 14). The bankruptcy court issued a report (doc. 23) which recommends that Padgett's motion to approve the settlement agreement be approved as in the best interest of the Debtor's estate. Having considered the report and recommendation, the Court now adopts the recommendation of the bankruptcy court.

Accordingly, it is hereby ORDERED:

1. The bankruptcy court's report and recommendation (doc. 23) is adopted and incorporated by reference in this order of the Court.
2. Padgett's motion to approve settlement of the controversy (doc. 9) is GRANTED.
3. This matter is referred to the bankruptcy court for final resolution.
4. The Clerk shall transmit to Judge Killian a certified copy of this order.

ORDERED on this 22nd day of Oct 1998.

s/_____

Lacey A. Collier
United States District Judge